

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 274

**JAMES P. MITCHELL, SECRETARY OF LABOR,
PETITIONER,**

vs.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 28, 1960

CERTIORARI GRANTED OCTOBER 17, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, SECRETARY OF LABOR,
PETITIONER,

vs.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MAINE, NORTHERN DIVI-
SION**

Civil Action File No. 1050

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Plaintiff,**

v.

**WHITAKER HOUSE COOPERATIVE, INC., PHILIP S. BIRD, Presi-
dent, EVELYN M. WHITAKER, Treasurer and General Man-
ager, and EVELYN M. WHITAKER, individually, Defendants**

COMPLAINT—Filed Sept. 30, 1957

I

Plaintiff brings this action to enjoin the defendants from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the said Act.

III

Defendant, Whitaker House Cooperative, Inc., is a corporation duly organized and existing under the laws of the State of Maine, having its principal place of business at Troy, Waldo County, Maine, within the jurisdiction of this Court; and is now, and has been since July 18, 1957, engaged in commerce or in the production of goods for commerce. The said corporation is engaged in the production, sale and distribution of hand-crocheted baby booties, sacques, bonnets and related products and is an employer within the definition used in Section 3(d) of the said Act.

Defendant, Philip S. Bird of Waterville, Kennebec County, Maine, is President and actively engaged in the management of said corporation, and is now, and has been

since July 18, 1957, an employer within the definition used in Section 3(d) of the said Act.

[fol. 2] Defendant, Evelyn M. Whitaker, residing in Troy, Waldo County, Maine, is Treasurer and General Manager of said corporation, and is now, and has been since July 18, 1957, responsible for the general supervision of the property and affairs of the corporation, and is an employer within the definition given in Section 3(d) of the said Act.

Defendant, Evelyn M. Whitaker, residing in Troy, Waldo County, Maine, within the jurisdiction of this Court, was the sole owner and operator of a business located at Troy, Waldo County, Maine, where from September 1954 to July 18, 1957 she was engaged, in interstate commerce, in the production, sale and distribution of hand crocheted baby booties, sacques, bonnets and related products, and was an employer within the definition given in Section 3(d) of the said Act.

IV

At all times hereinafter mentioned, defendants employed and are employing, approximately one hundred (100) homeworkers in the employees' homes in the State of Maine, in the production of hand-crocheted baby booties, sacques, bonnets and related products, for interstate commerce within the meaning of the Act. Homeworkers are, and at all times hereinafter mentioned were, employees within the meaning of the Act, and especially Section 3(e) and (g) thereof. Substantially all of the goods produced by the defendants' employees have been, and are being shipped, delivered, transported, offered for transportation, and sold in interstate commerce, or shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce is intended from defendants' said place of business to other States.

V

Defendant, Evelyn M. Whitaker, individually, repeatedly has violated the provisions of Sections 6 and 15(a)(2) of the Act by paying to many of her employees for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid, wages at rates less than seventy-five (75) cents an hour from September 1954 to February 29, 1956, and less than one (1)

dollar an hour from March 1, 1956 up to and including July 17, 1957.

Defendants, Whitaker House Cooperative, Inc., Philip S. Bird, President, Evelyn M. Whitaker, Treasurer and General Manager, repeatedly have violated, and are violating, the provisions of Sections 6 and 15(a)(2) of the Act by paying to many of their employees for their employment in interstate commerce and in the production of goods for [fol. 3] interstate commerce, as aforesaid, wages at rates less than one (1) dollar an hour since July 18, 1957.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Sections 11(c) and 11(d) of the Act, duly issued and promulgated regulations prescribing the records of persons employed, including homeworkers, and of wages, hours and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provision of the Act including every such employer who directly or indirectly distributes work to be performed by an industrial homeworker. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendants, employers subject to the provisions of the Act, repeatedly have violated, and are violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since September 1954 Evelyn M. Whitaker, individually, and since July 18, 1957 Whitaker House Cooperative, Inc., Philip S. Bird, President, and Evelyn M. Whitaker, Treasurer and General Manager, have failed to make, keep, and preserve adequate and accurate records of their employees and the wages, hours and other conditions and practices of employment maintained by them; as prescribed by the said regulations in that the records kept by the defendants failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are

paid, and the total straight-time earnings for each work-week, with respect to many of their employees. The defendants have failed to obtain and keep a separate handbook for each industrial homemaker employed in a home, apartment, or outside their place of business, and has failed to enter in the aforesaid handbooks, the information required by the aforesaid regulations.

VIII

Effective June 17, 1955, the Secretary of Labor, U. S. Department of Labor, pursuant to the authority conferred upon him by the Act, duly issued and promulgated regulations providing, among other things, for the issuance of certificates to an employer authorizing him to employ workers in industrial homework in knitted outerwear industry where certain specified conditions were met. Said regulations were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 617.

[fol. 4]

IX

Since on or about June 17, 1955 and up to and including July 17, 1957 defendant, Evelyn M. Whitaker, individually, and since July 18, 1957 defendants, Whitaker House Cooperative, Inc., Philip S. Bird, President, and Evelyn M. Whitaker, Treasurer and General Manager, have violated and are violating the terms and conditions of the aforementioned regulations by employing, suffering and permitting many of their employees to do work in the production of goods for interstate commerce, as aforesaid, in and about a home, apartment or room in a residential establishment without special homework certificates having been obtained for such employees in accordance with the terms and conditions of the aforementioned regulations applicable thereto.

X

Defendant, Evelyn M. Whitaker, individually, has violated the provisions of Section 15(a)(1) of the Act from September 1954 up to and including July 17, 1957, and defendants, Whitaker House Cooperative, Inc., Philip S. Bird, President, and Evelyn M. Whitaker, Treasurer and Gen-

eral Manager repeatedly have violated, and are violating the provisions of Section 15(a)(1) of the Act in that since July 18, 1957 they have shipped, delivered, transported, offered for transportation and sold in interstate commerce, or shipped, delivered, or sold with the knowledge that shipment, delivery or sale thereof in interstate commerce was intended from their said place of business to other States, goods in the production of which many of their employees were employed in violation of Section 6 of the Act as alleged.

XI

Defendants have, since the effective dates thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, and all other persons acting or claiming to act in their behalf and interest, from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

Stuart Rothman, Solicitor. Thomas L. Thistle, Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: 18 Oliver Street, Boston 10, Massachusetts.

[fol. 5] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MAINE, NORTHERN DIVISION

[Title omitted]

DEFENDANT'S ANSWER—Filed OCTOBER 19, 1957

The defendants Whitaker House Cooperative, Inc., Philip S. Bird, President, Evelyn M. Whitaker, Treasurer and General Manager, and Evelyn M. Whitaker, individually, answer to the complaint as follows:

First: Defendants admit the allegations contained in paragraphs numbered I, II, VI, and VIII of the complaint.

Second: Defendants admit that Whitaker House Cooperative, Inc. is a corporation duly organized and existing under the laws of the State of Maine, having its principal place of business at Troy, Waldo County, Maine, within the jurisdiction of this court that defendant Philip S. Bird of Waterville, Kennebec County, Maine, is President and Evelyn M. Whitaker is General Manager of said corporation.

Third: Defendants deny each and every allegation contained in paragraphs numbered III, IV, V, VII, IX, X, and XI of the complaint except such matters as admitted by the second paragraph of this answer.

Philip S. Bird, Attorney for defendants, Office and P.O. Address, Bird & Bird, 152 Main Street, Waterville, Maine.

[File endorsement omitted.]

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MAINE, NORTHERN DIVISION

[Title omitted]

PLAINTIFF'S REQUESTS FOR ADMISSIONS OF FACT BY, AND ANSWERS TO INTERROGATORIES PROPOUNDED TO DEFENDANT WHITAKER HOUSE COOPERATIVE, INC.—Filed October 25, 1957

Plaintiff, James P. Mitchell, Secretary of Labor, United States Department of Labor, requests Whitaker House Cooperative, Inc., defendant herein, within fifteen (15)

days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, and to answer the following interrogatories:

I

[fol. 7] * * * If Request No. 5 is *denied*, in whole or in part, state the names and addresses of all persons who previously took or presently take part in the production or manufacture of any hand-made infants' wear handled or sold or distributed by defendant Whitaker House Cooperative, Inc., the places where, the ways in which, and the period during which each such person took part in such production or manufacture, * * *

[fol. 8] 9. If Request No. 8 is admitted, state the dates and amounts paid each such homemaker. If Request No. 8 is *denied*, in whole or in part, state the method, dates and amounts paid each person who previously took or presently takes part in the production or manufacture of any hand-made infants' wear handled or sold or distributed by defendant Whitaker House Cooperative, Inc.

[fol. 9] 23. Defendant Whitaker House Cooperative, Inc. controls, or is in a position to control, the styles, colors and designs of goods produced for it and furnished to it by its homeworkers,

25. Defendant Whitaker House Cooperative, Inc. controls, or is in a position to control, the quality of goods produced for it and furnished to it by its homeworkers.

[fol. 10] 30. Defendant Whitaker House Cooperative, Inc., in the operation of the business described, shows or furnishes to homeworkers who take part in the production or manufacture of hand-made infants' wear for said defendant appropriate designs, samples or patterns when deemed necessary in order to promote conformity of

product with the style, design, pattern or quality desired by said defendant.

32. Defendant Whitaker House Cooperative, Inc. restricts and prohibits, or is in a position to restrict and prohibit, the production for or sale to any other wholesale or retail business by its homeworkers of any knitted, crocheted or embroidered articles which are the same or similar to the products produced for said defendant by such homeworkers.

34. State the minimum and maximum piece rates paid to homeworkers for the various specific items, in the production of which for defendant Whitaker House Cooperative, Inc. homeworkers take part, and state the criteria considered in said defendant's determination as to what any one homemaker will be paid for any particular item.

[fol. 12] 65. Defendant Whitaker House Cooperative, Inc., acting directly or indirectly through defendant Evelyn M. Whitaker, has not applied for or obtained special homework certificates as required by Regulations, Part 617, Title 29, Chapter V, Code of Federal Regulations, a copy of which is attached herewith as Exhibit "II."

B.

67. Homeworkers who wish to take part in the production or manufacture of hand-made infants' wear, the production of which is an integral part of the business of the defendant Whitaker House Cooperative, Inc., apply to said defendant, acting directly or indirectly through defendant Evelyn M. Whitaker.

[fol. 13] 68. Defendant Whitaker House Cooperative, Inc., acting directly or indirectly through defendant Evelyn M. Whitaker, accepts or rejects applications for homework on the basis of an estimate of the quantity and quality of the proposed production by applicants.

[fol. 14] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE, NORTHERN DIVISION

[Title omitted]

DEFENDANTS' ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS OF FACT AND INTERROGATORIES—Filed December 13, 1957

Now comes the defendant Whitaker House Cooperative, Inc. by its President Philip S. Bird, who having been duly sworn in response to the plaintiff's requests for admissions of fact and interrogatories served upon the defendant in the above case on the twenty-sixth day of October, 1957, makes the following answers and responses:

[fol. 15] 9. Defendant answers plaintiff's interrogatory number 9 and states that each member of the Cooperative who submits items for sale by the Cooperative is paid once a month for work submitted for sale during the previous month on a rate per dozen basis established by the management with the consent of the Board of Directors. This monthly payment is an advance allowance to the member. The member does not receive his full share for the work submitted to the Cooperative until such time as the Board of Directors in its discretion decides to have an accounting and distribution of excess receipts to the members on the basis of the amount of goods which each member has submitted to the Cooperative for sale. A schedule of the amounts paid to each member is attached hereto as Schedule A. Payments are made by check and signed by the Treasurer of the Cooperative.

[fol. 16] 23. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 23. However, the defendant does attempt by use of persuasion to inform the members that certain styles, colors, and designs of goods could be readily sold because of orders that the Cooperative has received.

25. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 25. This question is denied because of the phraseology of the question, inasmuch as no goods are produced for the Cooperative as such. However, the defendant admits that it does control or is in a position to control the quality of goods that it sells.

.

[fol. 17] 30. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 30. The defendant states that a number of designs or patterns are maintained in the inventory and the members make such designs and patterns as they wish to. The members create new designs and submit them to the Cooperative and the Cooperative attempts to determine whether or not this particular design would be salable.

32. The defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 32. This denial is based primarily on the wording of the particular request for admission. The defendant does admit that it is empowered by its by-laws to restrict and prohibit its members from selling or furnishing to any other wholesale or retail business any knitted or crocheted articles which are the same or similar to the products sold by the defendant Whitaker House Cooperative, Inc.

.

34. The defendant, in answering plaintiff's interrogatory number 34, states that the defendant has not been in business long enough to determine what the maximum rate will be after the distribution of excess profits to the members. However, the members receive their advance allowance according to Schedule C which is attached hereto. The criteria which is used to establish this initial allowance rate is composed of several different factors which are listed as follows, not necessarily in their order of importance:

1. What would be a fair rate for the member for this particular type of work? This again depends upon the cost of the materials which the member used in the goods and the complexity of the particular item.

2. An attempt is made to estimate as best as possible what the retail stores will pay for this item.
 3. An estimate of the amount of finishing work which has to be done to the article must be considered.
 4. All the costs of the overhead have to be considered.
- * * * * *

[fol. 18] 65. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 65. This question is denied because of the phraseology of the request for admission. The defendant Whitaker House Cooperative, Inc. has not applied for or obtained special homework certificates as described by Regulations, Part 617, Title 29, Chapter V, Code of Federal Regulations.

B

67. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 67. Individuals who wish to become members of Whitaker House Cooperative, Inc. make application through any one of the Board of Directors, defendant Philip S. Bird, or the defendant Evelyn M. Whitaker.

68. Defendant denies the truth of the statement contained in plaintiff's request for admission of fact number 68. The defendant Whitaker House Cooperative, Inc. admits that the defendant Evelyn M. Whitaker is authorized by the Board of Directors to accept or reject applications for membership on the basis of her estimate as to the quality of the work done by a particular applicant. If the applicant is rejected by the defendant Evelyn M. Whitaker, the applicant can then appeal to the Board of Directors for a determination by the Board as to whether the applicant can be accepted to membership. Quantity is not a consideration in determining whether or not a particular applicant will become a member.

* * * * *

[fol. 19]

SCHEDULE "C"

JAMES P. MITCHELL, SECY OF LABOR

vs.

WHITAKER HOUSE COOPERATIVE, INC.

Civil Action File No. 1050

Schedule of Allowance Rate Changes

Date of Rate Change, September 1, 1957

Style No.	Type	Rate per Dozen	
		Old Rate	New Rate
1	Set	34.00	36.00
2	Set	36.00	36.00
3	"	34.00	36.00
4	"	36.00	36.00
5	"	36.00	36.00
6	"	34.00	34.00
7	"	24.00	30.00
8	"	24.00	26.00
9	"	24.00	28.00
10	"	24.00	26.00
11	"	24.00	26.00
12	"	24.00	26.00
13	Boatie	7.50	7.50
14	"	4.50	5.50
15	"	6.00	6.00
16	"	6.00	6.00
17	"	6.50	7.50
18	"	6.00	6.50
19	"	6.00	6.50
20	"	6.00	6.00
21	"	7.50	7.50
22	"	6.00	6.50
23	"	7.00	7.50
24	"	7.00	7.50
25	"	7.00	7.50
26	"	7.00	7.50
27	"	6.50	7.50
28	"	5.50	6.00
29	"	7.00	7.50
30	"	5.50	6.00
31	"	6.00	6.00
32	"	7.00	7.00
33	"	6.00	6.00
34	"	5.50	5.50
35	"	6.50	6.50
36	"	5.00	5.50
37	"	4.50	4.50
38	"	5.00	5.00
39	"	8.00	8.00
40	"	15.00	15.00
41	"	6.50	6.50
42	"	7.00	7.00
43	"	7.00	7.00
44	"	4.50	5.50

Style No.	Type	Rate per Dozen	
		Old Rate	New Rate
45	"	6.00	6.50
46	Helmet	8.00	8.00
47	Cap	8.00	8.00
48	Bonnet	8.00	8.00
49	Bib	5.00	5.00
50	"	4.80	4.80

[fol. 20]

[File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MAINE, NORTHERN DIVISION

[Title omitted]

PLAINTIFF'S REQUESTS TO DEFENDANT EVELYN M. WHITAKER
FOR ADMISSIONS OF FACT AND FOR ANSWERS TO INTERROGA-
TORIES—Filed May 29, 1958

Plaintiff, James P. Mitchell, Secretary of Labor, United States Department of Labor, requests Evelyn M. Whitaker, defendant herein, within fifteen (15) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, and to answer the following interrogatories:

1. You are requested to admit that, sometime during the period since September, 1954, you have owned and operated a business located at Troy, Waldo County, Maine.

2. You are requested to admit that the business referred to in Request Number 1 has consisted of the production or manufacture, sale and distribution of hand-crocheted and hand-knitted baby booties, sacques, bonnets, sets, and other related infants' outerwear.

[fol. 21] 12. You are requested to admit that in the operation of your said business you have controlled, or have been in a position to control, the styles, colors and designs of infants' wear to be knitted or crocheted for delivery to you by a said person.

14. You are requested to admit that in the operation of your said business you have controlled or have been in a position to control, the quality of infants' wear to be knitted or crocheted for delivery to you by a said person.

.

17. You are requested to admit that in the operation of your said business you have rejected, or have been in a [fol. 22] position to reject, items or payment for items of infants' wear knitted or crocheted for delivery to you by a said person, for which you may have believed you have no market, or for which you may have found no market.

.

19. You are requested to admit that, in the operation of your said business, you have shown or furnished to persons who have knitted or crocheted infants' wear for delivery to you, appropriate designs, samples or patterns, when deemed necessary in order to promote conformity of product with the style, design, pattern or quality desired by you.

.

[fol. 23] 34. You are requested to set forth, month by month, the quantity of your stock, during each month since September, 1954, of each (a) item and (b) grade of each item.

.

39. You are requested to admit that, in the operation of your business, the prices you have received from stores to which you have sold items of handmade infants' wear have been in excess of the amounts paid to the persons who have knitted or crocheted the items so sold by you.

.

[fol. 24] 41. You are requested to admit that the prices received by you from stores to which you have sold items of hand-made infants' wear have resulted in a net profit to you over operating expenses.

.

[fol. 25] 66. You are requested to admit that, in the performance of your duties for defendant, Whitaker House Cooperative, Inc., you tell persons who knit or crochet infant's wear what items to make and which items are saleable.

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MAINE, NORTHERN DIVISION

Civil Action File No. 1050

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Plaintiff,

v.

WHITAKER HOUSE COOPERATIVE, INC., PHILIP S. BIRD, President, EVELYN M. WHITAKER, Treasurer and General Manager, and EVELYN M. WHITAKER, individually, Defendants

DEFENDANTS' ANSWER TO PLAINTIFF'S REQUEST FOR ADMISSION NUMBER 6 PURSUANT TO ORDER OF COURT DATED FEBRUARY 4, 1958—Filed August 6, 1958

6. The defendant responds and says that the names and addresses of the members of Whitaker House Cooperative, Inc. who make items and submit them for sale by the defendant Cooperative are listed in Exhibit A attached hereto. The members of the Cooperative make these items anywhere they wish to make them using their hands and materials bought and paid for by themselves. Some members submit more items for sale by the Cooperative than others. Defendants' answer to plaintiff's request for admission number 9 gives a schedule of payments made to members for items sold through the Cooperative and the dates of such payments. This would be the only way of determining when any individual member was actually submitting items for sale.

STATE OF MAINE,
County of Kennebec, ss:

Philip S. Bird, being duly sworn, upon his oath deposes and says:

1. I am the President of Whitaker House Cooperative, Inc., the defendant in the above-entitled action, and I am the agent of that corporation for the purpose of answering the interrogatories served upon the corporation by the plaintiff James P. Mitchell, on the twenty-sixth day of October, A.D. 1957 and for making this verification.

[fol. 27] 2. I have read the said interrogatories, and the foregoing answers thereto are true according to the best of my knowledge, information, and belief.

Witness my hand and seal this eleventh day of December, A.D. 1957.

Philip S. Bird.

August 6, 1958.

Kennebec, ss:

Personally appeared the above-named Philip S. Bird and acknowledged the foregoing instrument to be his free act and deed.

Before me,

Harry R. Derry, Notary Public.

My commission expires January 22, 1965.

[Vol. 28]

EXHIBIT "A"

Members of the Whitaker House Cooperative, Inc.

Kate Adams
R. F. D. #1
Medina, Tennessee

Marcia Bailey
Thorndike, Maine

Priscilla Bailey
Unity, Maine

Mrs. Thomas G. Baker
R. F. D. #5
Trenton, Tennessee

Ella Mae Banton
Newport, Maine

Rose Bechard
48 Hallowell Street
Waterville, Maine

Mertie E. Bennett
R. F. D. #1
Pittsfield, Maine

Opal Bennett
Abbott Village, Maine

E. Madeline Berry
Morrill, Maine

Grace Berry
Newport, Maine

Alice Black
R. F. D. #1
Belfast, Maine

Annie Black
Glen Cove, Maine

Faye Black
646 Wapping Road
Newport, Rhode Island

Mary Bledsoe
R. F. D. #1
Humboldt, Tennessee

Stella Blood
Morrill, Maine

Ida M. Bowdin
Penobscot, Maine

Alice O. Boyd
231 Essex Street
Bangor, Maine

Nettie Boyington
Lincoln Center, Maine

Chastina Brawn
Newport, Maine

Flora Bredeen
Unity, Maine

Annie Brockett
R. F. D. #1
Pittsfield, Maine

Margaret Brown
14 Oakland Street
Waterville, Maine

Evelyn Bryant
41 W. Broadway
Lincoln, Maine

Alexia Busque
4 Dalton Street
Waterville, Maine

Grace Butterfield
Lincoln, Maine

Eura Campbell
R. F. D. #6
Trenton, Tennessee

Laura Carr
Stillwater, Maine

Theresa D. Casavant
16 N. Garand Street
Waterville, Maine

Tessie Chadbourne
Hampden Highlands, Maine

Audrey Clark
Troy, Maine

Nellie Clark
Freedom, Maine

Sallie Lou Cole
R. F. D. #5
Trenton, Tennessee

Lillian Cook
Unity, Maine

Pearl Cook
Newport, Maine

[fol. 29] Wavie H. Cordini
528 2nd Avenue So.
St. Petersburg, Florida

Anna C. Crawford
M. R. A.
Bangor, Maine

Minerva J. Crosby
Stockton Springs, Maine

Dorrice Cross
Thorndike, Maine

Leona Crowell
Unity, Maine

Majorie Cushing
52 Office Drive
Bath, Maine

Florence Davis
Warren, Maine

Sibyl L. Deering
Brooks, Maine

Elsie Doucette
5 Belmont Avenue
Waterville, Maine

Mildred Drake
58 Washburn Street
Caribou, Maine

Gladys M. Drew
R. F. D. #2
Island Falls, Maine

Edna Dunton
R. F. D. #1
Pittsfield, Maine

Norma Dyer
115 Circle Drive
Milan, Tennessee

Wilhelmina Edmonds
Burnham, Maine

Marietta P. Elwell
Waldoboro, Maine

Dorothy Emery
Albion, Maine

Grace Evans
E. Hiram, Maine

Mrs. J. C. Fanning
R. F. D. #2

Big Sandy, Tennessee

Bertha Faulkner
Carmel, Maine

Dora Fernald
Thorndike, Maine

Sally Fernald
Unity, Maine

Marilyn Fetzer
3284 W. Webster
Royal Oak, Michigan

Pauline Fisher
307 North Montclair
Dallas 8, Texas

Dorothy Flanders
Lincoln Center, Maine

Katrinia Fletcher
Burnham, Maine

Florence Fogg
Winn, Maine

Virginia Foss
Steuben, Maine

Luttie Foster
Unity, Maine

Merna A. Foulkes
15 Center Street
Waterville, Maine

Mai Foust
R. F. D. #4
Trenton, Tennessee

Mabel Freels
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Paducah, Kentucky

Marion Fryer
Cooper, Maine

Mrs. C. E. Fuller
R. F. D. #3
Humboldt, Tennessee

Hattie Gagnon
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Waterville, Maine

Rachel Genreau
R. F. D. #3
Waterville, Maine

Alma Gerry
Detroit, Maine

Gayle Goff
R. F. D. #3
Humboldt, Tennessee

[fol. 30] Gertrude Goodwin
Unity, Maine

Mina E. Goodwin
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Lincoln, Maine

Mrs. Scott Hackett
R. F. D. #1
Pittsfield, Maine

Bernice Hall
Unity, Maine

Cecilia Hallee
79½ Water Street
Waterville, Maine

Clara Hamlin
Brighton, Maine

Annie Hanks
M. D. 1
Augusta, Maine

Dora Hanson
Newport, Maine

Sally Hawes
Stockton Springs, Maine

Nola Higgins
Thorndike, Maine

Glennie Hisler
R. F. D. #2
Cooper Mills, Maine

Olive Hitchcock
3 Vine Street
Belfast, Maine

Beulah K. Holden
Newport, Maine

Alma Holder
R. F. D. #1
Humboldt, Tennessee

Lettie Hollis
Troy, Maine

Kate Holmes
Jacksonville, Maine

Margaret Hooper
Franklin, Maine

Beatrice Howard
East Hiram, Maine

Florence Howe
Detroit, Maine

Dorie Huff
Burnham, Maine

Ella Hunt
Albion, Maine

Helen Hurd
Troy, Maine

Florence Hutchins
Jefferson, Maine

Matilda J. Ireland
12 Clay Street
Lincoln, Maine

Lessie Jackson
R. F. D. #1
Humboldt, Tennessee

Margaret Jackson
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Tupelo, Mississippi

Fannie Johnson
Unity, Maine

Jennie H. Jones
Morrill, Maine

Dorothy Knowles
Guilford, Maine

Gleecie Lawler
R #2
Trenton, Tennessee

Audrey Leavitt
Hampden Highlands, Maine

Esther Leavitt
Newburg, Maine

May Lembo
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Waltham, Massachusetts

Melvina Lessard
R #1
Clinton, Maine

Lizzianne Levasseur
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Waterville, Maine

Lena Liberty
18 Douglas Street
Uxbridge, Massachusetts

[fol. 31] Dorothy Linscott
R. F. D.
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Fernande Loubier
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Waterville, Maine

Maggie Lutz
Unity, Maine

Faylene McDonald
Albion, Maine

Lillie B. McEwen
R #4
Humboldt, Tennessee

Lena McGennes
Detroit, Maine

Maude McGray
Belfast, Maine

Hope McLaughlin
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Old Town, Maine

Jessie Marr
Newport, Maine

Blanche Marston
Lincoln, Maine

Emma Mathis
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Annabelle Merrill
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Leona Middlecoff
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Carrie Morris
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Athine L. Mosher
Burnham, Maine

Maud L. Moss
R. F. D. #1
Humboldt, Tennessee

Gertrude Nason
Brooks, Maine

Avis Oberg
Milford, Maine

Marilyn Owen
Unity, Maine

Carrie Page
Dover Foxcroft, Maine

Ethel Parker
Milbridge, Maine

Lillie Peace
R #2
Milan, Tennessee

Sadie Pelletier
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Yvonne Pooler
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Juanita Pope
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Jane Rich
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Susie Rideout
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Iva Rines
Unity, Maine

Lennie Robinson
M. R. A.
Bangor, Maine

[fol. 32] Margaret Rogers
Belfast, Maine.

Jessie Rowland
Rockville, Tennessee

Ida Roy
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Laura Roy
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Frenchville, Maine

Arlene Sanborn
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Brewer, Maine

Mabel Sanborn
Olomon, Maine

Elsie Shank
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Winslow, Maine

Pearl Shorey
Dixmont, Maine

Nellie Shute
Stockton Springs, Maine

Ida Simmons
West Appleton, Maine

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Viola Skinner
Weeks Mills, Maine

Florence Soule
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Luvie Spencer
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Hattie L. Stanwood
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Mrs. Boyd Stevens
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Abbie Stuart
E. Hiram, Maine

Jennie Tash
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Mrs. W. E. Walcott
Lincoln Center, Maine

Jean L. Walker
R #1
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[fol. 33] Dora Walsh
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Mary Waning
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Hattie Wayman
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Ethel Whitcomb
Newburg, Maine

Bessie White
Liberty, Maine

Martha Whitney
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Della Whittemore
Upper Main Street
Skowhegan, Maine

Inez Whitten
217 High Street
Belfast, Maine

Maud Wilson
R. #1
Pittsfield, Maine

Ruth Wilson
R #1
Pittsfield, Maine

Geneva Wingate
Unity, Maine

Mildred Worcester
Columbia Falls, Maine

Louise Yager
R # 3
Oneonta, New York

Amy York
334 High Street
Oakland, Maine

[fol. 34]

[File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE, NORTHERN DIVISION

Civil Action File No. 1050

[Title omitted]

DEFENDANT'S ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS OF FACT AND FOR ANSWERS TO INTERROGATORIES—
Filed August 26, 1958

Now comes the defendant Evelyn M. Whitaker, who having been duly sworn in response to the requests for admissions of fact and the interrogatories makes the following answers and responses:

1. Admitted.

2. Defendant denies the truth of statement contained in request for admission No. 2 except that the defendant admits she has engaged in the business of buying and selling hand-crocheted and hand-knitted baby booties, sacques, bonnets, sets, and other related infants' outerwear.

[fol. 35] 12. The defendant denies the request for admission of No. 12 but admits that in the operation of her business she tried to purchase styles, colors and designs of infants' wear for which she had orders or which she felt she could sell.

14. The defendant denies the request for admission of No. 14 except that defendant admits that she would not buy items if they were not of good quality.

17. The defendant denies the request for admission of No. 17 except that she states that if she knew when she first saw an item that she could not sell it, she would not buy it.

19. The defendant denies the request for admission of No. 19 but states that in the operation of her business she would show samples of the sort of things she bought and sold and told the person to whom she was showing them that

if they wished to make items like them that she would try to buy them.

[fol. 36] 39. Admitted.

41. Admitted

[fol. 37] 66. The defendant denies the request for admission of No. 66 but admits that she often gives information to the members as to what items are called for in the orders that have been received by the Cooperative.

[fols. 1-2] **UNITED STATES DISTRICT COURT, DISTRICT OF
MAINE, NORTHERN DIVISION**

Civil Action File No. 1050

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Plaintiff,**

v.

**WHITAKER HOUSE COOPERATIVE, INC., PHILIP S. BIRD, Presi-
dent, EVELYN M. WHITAKER, Treasurer and General Man-
ager, and EVELYN M. WHITAKER, individually, Defendants**

Transcript of Proceedings

**Before Honorable Edward T. Gignoux, Judge, U. S. Dis-
trict Court.**

APPEARANCES:

**Attorney for Plaintiff: Thomas L. Thistle, Esq., Regional
Attorney, U. S. Department of Labor, Boston, Mass.**

**Attorney for Defendants: Philip S. Bird, Esq., Attorney-
at-Law, Waterville, Maine.**

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[fol. 3] COLLOQUY BETWEEN COURT AND COUNSEL

**The Court: The Court, before hearing the opening argu-
ment of counsel, will simply state for the record that in
the course of pretrial proceedings it has been stipulated
and agreed between the parties that all material facts exist
in this action without substantial controversy, except the
following:**

**•First, whether or not the persons producing infants'
knitted and crocheted outerwear which is sold by the de-
fendant are employees of the defendant within the meaning
of the Fair Labor Standards Act of 1938, as amended, and
the applicable regulations issued thereunder; and, second,
whether or not such persons are industrial homeworkers
within the meaning of said Fair Labor Standards Act and
regulations, and it has been further stipulated and agreed**

between the parties that upon the trial all material facts except the foregoing shall be deemed established. The stipulation was in written form, dated February 4, 1958, and filed in this Court on the same date.

The Court will state its further understanding that counsel are now prepared to stipulate that the only issue in fact at the present time is the first issue as set forth in the [fol. 4] written stipulation. The parties being in agreement that if the Court concludes that the persons producing infants' knitted and crocheted outerwear which is sold by this defendant are employees of the defendant within the meaning of the Act and regulations, it would necessarily follow that they are industrial homeworkers within the meaning of the Act and regulations and that if the Court should conclude that such persons are not employees, it would necessarily follow that they are not industrial homeworkers.

The Court inquires as to whether counsel are in concurrence with the stipulation as indicated by the Court? First, of counsel for the plaintiff?

Mr. Thistle: Your Honor, as I heard the agreement read and the stipulation, defendant was in the single rather than the plural. Of course, in our conferences it was agreed that the only issue would be as to the Defendant Whitaker House Cooperative, Inc., but there are two other defendants in the case as employers.

The Court: Well, if the stipulation were modified to read "defendant or defendants" that would cover that problem, Mr. Thistle?

Mr. Thistle: Yes, your Honor.

[fols. 5-14] The Court: With that modification, is the stipulation in accordance with the plaintiff's understanding?

Mr. Thistle: Yes, your Honor.

The Court: And with that modification, is the stipulation in accordance with the understanding of the defendants?

Mr. Bird: It is the understanding of the defendant in relation to the defendant Philip S. Bird as President of the Cooperative, not as Philip S. Bird individually.

The Court: Well, Mr. Bird, you are appearing as counsel for all of the defendants?

Mr. Bird: Right.

The Court: In that capacity is the stipulation, as indicated by the Court, in conformity with your understanding?

Mr. Bird: Yes, your Honor.

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[fol. 12] The Court: The plaintiff may call his first witness.

Mr. Thistle: Mrs. Whitaker, please.

EVELYN WHITAKER, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Thistle:

Q. Your name?

A. Evelyn Whitaker.

Q. Place of residence?

A. Troy, Maine.

Q. How long have you lived in Troy, Maine?

A. Oh, about 47 years.

[fol. 13] Q. At one time you became associated with the business of crocheting infants' wear?

A. I did.

Q. What was your earliest connection with that type of work?

A. Well, about 25 years ago.

Q. And did you do the work individually? That is, did you do the knitting and crocheting yourself?

A. I have.

Q. And what was your first connection with this type of business?

A. I used to sell to New York firms.

Q. You personally sold to New York articles that you had knitted and chocheted?

A. Yes.

Q. Who did you sell to?

A. Well, I sold to the Newport Knitting Company and Babyknit and Edward Wagner, also.

Q. Any other organization?

A. No.

Q. And how long did this personal selling of your articles continue?

A. I don't think I could tell you a definite date.

Q. Several years?

A. About 15 years ago, I would say.

Q. Well, you started in about 15 years—

[fol. 14] A. No, 25—about 10 years, I would say.

Q. And then did you become a representative of some out of state concerns?

A. I did at that time.

Q. Who did you represent?

A. I don't know as I get your question just right?

Q. Well, did you manage a local business for a New York concern and gather these knitted articles and ship them to New York?

A. I bought them outright myself.

Q. And who did you ship to?

A. Newport Knitting Company and Babyknit.

Q. And how long a time did that continue?

A. Well, it might have been 10 or 12 years; I couldn't tell you.

Q. And then later did you—strike that out—

As a representative of out of state concerns to whom you sold items, did you employ women to do the knitting?

A. At that time? You mean way back there?

Q. Yes.

A. I don't know what you would call it; I bought from them.

Q. You bought from women, local women who did the knitting?

[fol. 15] A. Yes.

Q. And how long did you continue this purchasing and selling to out of state concerns?

A. Oh, I would say 10 or 12 years.

Q. How many women did you engage?

A. Well, that I couldn't tell you.

Q. Well, approximately how many did you accept work from?

A. Well, I couldn't answer that. It's been so long.

Q. Well, would you say 5 or 50 or 100 or more than 100 different women?

A. It might be 100.

Q. That would be your best estimate, around 100?

A. It might be.

Q. And what type of articles did you—did they furnish you?

A. The hand crocheted and knitted—

Q. Infants' or babys' pieces?

A. Infants, yes.

Q. And assuming that we know little or nothing about that work, will you describe the work to the Court?

A. It would be baby sets, three piece sets, booties and so on, caps.

Q. And what material is it knitted out of?

A. Wool and nylon.

Q. Yarn?

[fol. 16] A. Yes, yarn.

Q. And what articles or instruments are used in doing this knitting?

A. Knitting needles and crochet hooks.

Q. What do these needles cost?

A. Well, various prices, I would think.

Q. What would you say would be a usual price?

A. 10 or 25, 25 cents.

Q. And is that the only tools of the trade required by the woman knitter?

A. I think so.

Q. At some time did you go out of business for personal reasons?

A. I did, yes.

Q. Did you transfer your business to a neighbor?

A. Just the yarn business.

Q. Who did you transfer that to?

A. Mrs. Pearl Nutter.

Q. And do you know whether or not she lives in Troy?

A. I think so.

Q. Do you know whether or not she was engaged in court action fairly recently?

A. Yes, I think so.

Q. The same Pearl Nutter?

A. Yes.

Q. And as I understand it, you sold your inventory [fol. 17] of yarn to Pearl Nutter?

A. That's right.

Q. And did she carry on the business from then on?

A. Yes.

Q. And substantially in the same way as you carried on the business?

A. Well, I couldn't say to that because I wouldn't know.

The Court: About when did this transfer occur?

The Witness: About 15 years ago.

Q. And how long were you out of business?

A. I can tell you I started up about 5 years ago, my own business.

Q. You will agree that you have a fairly wide acquaintanceship in this area as a person who is engaged in this line of work?

A. I don't know just what you mean by that.

Q. Well, I will ask it this way. The ladies who do knitting of this type, or many of them, are acquainted with you and know that you are in the line of business?

A. Yes.

Q. And you are generally known as a person or have been for five years, who has been conducting a knitting business of this kind?

[fol. 18] A. Yes.

Q. And is it a fact that most of them come to you and ask you if you will take some of the knitting they furnish?

A. They have; some of them have.

Q. And sometimes do you go out and solicit their work?

A. I don't now. I used to when I had my own business.

Q. Well, I am confining my questions to from the time you started up about five years ago? How did you get most of the women in contact with you so that you could take their work?

A. I think I put an ad in the paper.

Q. And through the ad and through personal acquaintanceship and your reputation in the community you built up a business, a new business starting about five years ago?

A. Yes.

Q. And in this manner how many people—how many women became associated with you in this knitting work?

A. I couldn't tell you offhand. I will say 50 or so, 50 or more.

Q. Did they deliver the finished articles at your home?

A. Part of them.

Q. And some of them they mailed in?
[fol. 19] A. That's right.

Q. And then did they confer with you by telephone or mail or seeing you individually as to what type of articles or designs and colors that you thought could sell and therefore you would like to have them furnish you?

A. Sometimes.

Q. And you felt free to make any suggestion as to styles and colors and designs?

A. Well, may I state here that I have talked with Mr. Gould before I ever started up my business, and he advised me to start it.

Q. No, please, you are volunteering something and that is not our method of procedure because your attorney will have an opportunity—

The Court: The Court will perhaps inform the witness that the witness should answer only questions asked by the attorneys. Your own attorney, Mr. Bird, will ask you questions which he feels or you feel should be brought to the Court's attention. The witness' last answer beginning with the words: "May I state here . . ." will be stricken as not responsive.

You may proceed, Mr. Thistle.

By Mr. Thistle:

Q. Did you feel free to make suggestions to these people [fol. 20] who were furnishing you knitted articles?

A. Well, I thought I was, yes.

Q. And there is no question but what you took the liberty of giving them any instructions that you saw fit to give them or suggestions as to colors and designs and articles that might sell and articles you might like to receive from them?

Mr. Bird: Objection, your Honor. He is cross-examining the witness and leading the witness. It is the Government's witness.

The Court: Well, Mr. Thistle—

Mr. Thistle: She is the defendant, your Honor, and these are only preliminary leading questions so perhaps they could be rephrased.

The Court: Well, the Court will rule that the witness on

the stand, being the defendant and being an adverse party, the plaintiff will be permitted to lead the witness as an obviously hostile witness. The plaintiff will not be permitted at this time to attempt to impeach or discredit the witness.

Mr. Thistle: Yes, your Honor.

The Court: The objection is then overruled.

The reporter will read the question back to the witness. [fol. 21] The Court will simply add that if counsel for the defendant is of the opinion that any questions are misleading or such that the witness does not properly understand, counsel may, of course, note his objection and the Court will protect the witness.

(The pending question was read back by the reporter.)

By Mr. Thistle:

Q. Do you understand that question?

A. I understand the question, yes.

The Court: The witness will answer.

The Witness: I just don't know how you want—

Q. I beg your pardon?

A. Would you read that again please? I'm sorry.

(The pending question was again read back by the reporter.)

The Witness: I don't think I could answer that. I don't know.

By Mr. Thistle:

Q. Well, did you ever say to any of these women what design you would like—you would like to have them knit?

A. Yes.

Q. Did you ever tell them what colors?

A. Yes.

[fol. 22] Q. Did you ever talk styles with them?

A. I don't think so.

Q. Did you ever tell them what particular items you thought would be salable?

A. No.

Q. Well, then, will you explain how you operated the

business as to any control you exerted over items you received?

A. Well, I can. I used to go out and get my orders and then fill the orders when I got home.

Q. As you would call up neighbors and knitters—

A. No, I had the stock on hand before I went out.

Q. Yes.

A. I bought the stock up ahead and then went out and got my orders.

Q. If you got an order for, we will say, 20 dozen and you had the stock—oh, you fill them out of your stock?

A. That's right.

Q. And how did you replace the stock?

A. Well, they sold more work to me.

Q. That is, they mailed in or delivered—

A. Yes, sir.

Q. —or handed to you other items?

A. That's right.

[fol. 23] Q. And isn't it a fact that ordinarily each woman made an item which she was particularly familiar with?

A. Well, some of them did.

Q. And isn't it a fact that ordinarily they would continue with the same item unless you made some suggestion as to a change.

A. Not always.

Q. But many times it happened that way?

A. Yes.

Q. And if an item was not satisfactorily knitted, did you reject it?

A. I didn't buy it.

Q. That is, you refused to accept it if it wasn't properly knitted?

A. That's right.

Q. And did you have many rejections or refusals to buy or was most of the work—

A. I had a few.

Q. You were not present when the women did the work?

A. No.

Q. In their homes?

A. No.

Q. They didn't do the work in any factories?

A. No, not to my knowledge.

Q. And practically all the work was done by the women in their homes?

[fol. 24] A. Yes.

Q. That's right?

A. Yes, as far as I know.

Q. And they didn't have any regular working hours as far as you know?

A. No.

Q. Spare time and when the spirit moved, they would do some knitting of this type of infants' wear and then deliver in some way the item to you, correct?

A. Yes, that's right.

Q. And if you thought it was satisfactory, you put it in your inventory?

A. I bought it.

Q. And then you sent them a check?

A. Yes.

Q. If it wasn't satisfactory, you wouldn't hesitate to tell them so?

A. I just stated that.

Q. And when they did this work in available spare time from normal household or farm duties—

A. As far as I know.

Q. —did you pay them for each article or piece that they sent in?

A. If they sent one piece in, I did.

Q. And if they sent in a dozen, you would pay them by [fol. 25] the dozen.

A. That's right.

Q. And you would send them whatever check you thought was the proper amount that you could pay for the articles received.

A. I think sometimes there was agreement on that.

Q. Well, if there was no preliminary or previous agreement, you would determine the price and send them a check?

A. Yes.

Q. And in most of the instances there was no preliminary agreement?

A. No, I don't think so.

Q. That is, in practically all of the instances, you determined the price?

A. Oh, no, several stated their price.

Q. Several times that you conferred with them about the price?

A. That's right.

Q. Do you know where the ladies got their patterns?

A. Some did.

Q. You know the source?

A. I think they designed them.

Q. Individually?

A. Yes.

[fol. 26] Q. Find them in magazines?

A. I wouldn't know.

Q. Well, in your talks with these ladies, would they ever say how they happened to pick a particular pattern?

A. Well, they could have got them out of magazines.

Q. But ordinarily they designed them without any instruction from you and then submitted the items to you later?

A. That's right.

Q. Now, if an article was, we will say, too loosely knitted, would you call it to the attention of the knitter that you would prefer to have it more tightly knitted?

A. I might, yes.

Q. And is the reverse true; if it was too tightly knitted, you wouldn't hesitate to call their attention to the fact you would like to have it knitted a little looser in the future?

A. I could have, yes.

Q. And the ladies liked the work, didn't they?

A. They certainly did.

Q. Your relationship was very congenial?

A. That's right.

Q. And if you made any suggestions, they never hesitated to follow them?

[fol. 27] A. If they was capable of doing it, they did.

Q. And if they weren't capable, you would hesitate about accepting the item?

A. Yes, that's right.

Q. About how often, as an average, would you receive a shipment of a dozen—delivery of a dozen from a single individual knitter?

A. I don't know. I couldn't tell you that.

Q. Would you say once a month would be a common average?

A. I couldn't say they were. They sent them in when they got them done.

Q. And they usually sent them in about a dozen at a time?

A. Some did; some didn't.

Q. Some less?

A. Yes, that's right.

Q. And they furnished the yarn?

A. Yes, they bought their own material.

Q. Do you know who they bought it from?

A. No, I couldn't tell you.

Q. Isn't there a Fannie Johnson in Unity that you know?

A. Yes.

Q. And at one time you had business relations with [fol. 28] her in regard to knitting?

A. No.

Q. She is a good friend of yours?

A. Well, no better than others; no more than others.

Q. Is she a relative?

A. No.

Q. And would you suggest to different knitters occasionally that they could get the yarn from Mrs. Johnson, your friend in Unity?

A. I think she sent out cards when she bought her yarn to the members and different people.

Q. That is, you kept her posted as to—

A. No, she sent out cards to different ones.

Q. That is, the people in the community she knew, women that were doing this line of work, she sent out cards to?

A. Yes.

Q. Now, as far as you know, isn't it a fact that most everybody who is doing knitting for you sold to you only?

A. I don't know that. I wouldn't know.

Q. Well, you saw these knitters fairly frequently, didn't you?

A. Not all of them, no.

Q. Not all of them, but some of them you did?

A. Some.

[fol. 29] Q. And as to those you saw, you knew who they were selling to?

A. No, I did not.

Q. Never made it an item of inquiry?

A. No.

Q. Never gossiped about it or talked about it?

A. No.

Q. You just took the articles that they happened to send in and did business in regard to those articles?

A. That's right.

Q. And they never guaranteed a particular delivery, at any particular time?

A. No.

Q. And isn't it a fact that never or very rarely do they ever express any dissatisfaction with the way you are doing business with them?

A. I don't—I never heard anyone.

Q. Now, at your place of business at that time, did you have the articles received—employ a woman to put on ribbons and other little details so they would be more marketable?

A. Yes.

Q. She wasn't a knitter?

A. No.

Q. And then did she assist in packing the items and—
[fol. 30] A. No.

Q. And mailing them out?

A. No.

Q. Did you have a separate person do that or did you do that?

A. I did it myself.

Q. And since 19 — or 5 years ago, did you employ a broker to sell these items or did you have your own personal contacts?

A. I sold my own articles that I bought.

Q. At some time did you furnish a list of women or furnish in this case a list of women who did this work for you?

A. I don't get the question.

Q. In the preparation of this case, at some time did you furnish to the Court a list of the names of the women who were furnishing you this work?

A. I think so.

Q. And do you recall how many women were on that list?

A. No, I don't.

Q. Well—

Mr. Thistle: Could I see the pleadings.

I think counsel can agree, your Honor, that in the defendant Evelyn M. Whitaker's answers to the plaintiff's [fol. 31] interrogatories, the defendant Evelyn M. Whitaker furnished the name of 163 women with whom she or from whom she received infants' knitted wear.

The Court: During what period of time, Mr. Thistle?

Mr. Thistle: That is from about 5 years ago until the Cooperative was organized, is that right?

Mr. Bird: That's right.

The Court: Is that stipulated?

Mr. Bird: Over a 5 year period, beginning with 1954 and ending some time in the spring of 1957.

Mr. Thistle: That would be 3 years, '54 to '57.

Mr. Bird: Yes, 3 years, 1954 to 1957 she did purchase things at various times from that list of 163 women.

By Mr. Thistle:

Q. Now, if you didn't like a style or color, you didn't purchase it?

A. Yes, I did.

Q. That is even though you didn't like it, you didn't think it would sell, you purchased it notwithstanding?

A. I have purchased them——

Q. So——

A. —yes.

{fol. 32} Q. But isn't it a fact that ordinarily if you didn't approve of the color or style, you didn't make any purchase?

A. I can't recall that I didn't.

Q. And if you didn't like the quality, isn't it a fact that you refused to purchase it?

A. Yes, yes.

Q. And isn't it a fact that you usually determined whether or not the article was salable before you decided that you would purchase the article from the woman who was furnishing it to you?

A. Yes.

Q. Now, at some time in 1954, did an investigator from the Department of Labor, Wage and Hour Division, make an investigation of your operation?

A. I don't know as I could recall.

Q. You know Mr. Appleton Gould?

A. Yes.

Q. He is sitting here. Did he make an investigation?

A. In '56?

Q. In '56?

A. I think he called up to the house, yes.

Q. Did he go over your records?

A. I can't remember whether he went over all the records; I don't think so.

[fol. 33] Q. Then after he completed the investigation or did whatever work he happened to do, he had a talk with you?

A. Yes.

Q. And what did he say?

A. He advised me to keep on selling and sell to different stores so that they wouldn't say that I was employing anyone.

Q. Did he at any time inform you that your records were not accurate?

A. No.

Q. Did he or you suggest that as a result of his talk with you that you confer with an attorney?

A. I did, yes; that was in '57.

Q. Early in '57?

A. Yes.

Q. And what attorney did you confer with?

A. Philip Bird.

Q. And what was the occasion of your consulting Mr. Bird?

A. I don't know what you mean.

Q. Why did you, after a talk with Mr. Gould, go to see Mr. Bird?

A. I just thought it was advisable.

Q. And did Mr. Bird to your knowledge confer with the [fol. 34] Wage and Hour Office in Boston or the Regional Attorney?

A. I can't answer that.

Q. Do you recall a letter that—or see a letter that Mr. Bird received in January of '57 from the Regional Attorney?

A. I could have; I don't remember.

Q. Will you read this paper and recall whether or not

the original of that paper was ever shown to you by Mr. Bird, Exhibit 1?

The Court: Perhaps while the witness is reading this letter, we might take our midafternoon recess.

The Court will be in recess until five minutes past three by the courtroom clock.

(Recess: 2:50 p.m. to 3:05 p.m.)

The Witness: Would you be good enough to read the question again?

(The pending question was read back by the reporter.)

The Witness: No.

By Mr. Thistle:

Q. After reading the paper, do you recall ever having discussed the subject matter of the paper with Attorney Bird?

A. No. I can't remember of it.

[fol. 35] Q. Well, at some time you considered changing the business over to a Cooperative?

A. We had it suggested to us.

Q. And when was the first suggestion made?

A. Can I state who made the suggestion?

Q. Oh, certainly; yes?

A. Mr. Appleton Gould made the first suggestion.

Q. And when did Mr. Gould make that suggestion?

A. I couldn't tell you just the date. It must have been some time in June.

The Court: Of what year?

The Witness: '57.

Q. And at that time how many women were furnishing you infants' wear?

A. I couldn't tell you offhand.

Q. You can't tell me exactly?

A. No, I couldn't.

Q. Bringing it down to the month of June, will you give me your very best estimate of the number of women who were furnishing you infants' wear?

A. I couldn't tell you.

Q. Did you have an inventory at that time?

A. Yes.

Q. Who did you first consult, other than Mr. Gould whom you mentioned, in regard to changing your organization?

[fol. 36] A. No one.

Q. Well, at some time did you consult Attorney Bird?

A. Not until after Mr. Gould suggested the Cooperative.

Q. When did you consult Attorney Bird?

A. Mr. Gould picked me up one day and took me down to his office and we talked it over.

Q. And do you recall the date?

A. No, I don't.

Q. Well, you recall an organization meeting in the Jefferson Hotel in Waterville?

A. Yes.

Q. And what date was that meeting held on?

A. I couldn't tell you exactly. I should know the date, but I don't.

Q. Do you think it is an accurate suggestion that it was early in July of last year?

A. It was either the latter part of June or the first of July.

Q. 1957?

A. Yes.

Q. Who suggested the meeting?

A. I don't think I could answer that.

Q. Well, who made the arrangements and notified the people to be present?

A. I couldn't answer that.

[fol. 37] Q. How did you happen to attend?

A. Well, we talked it over among some of us, I think.

Q. Among some of the women who were doing knitting?

A. Yes.

Q. And after talking with them, did you confer with Attorney Bird?

A. Well, I can't tell you that. I couldn't answer that.

Q. Did Attorney Bird address that meeting?

A. Yes.

Q. Will you give us your best recollection that you have of what he said?

A. I couldn't tell you.

The Court: Will counsel approach the bench for a moment with the reporter.

PROCEEDINGS AT BENCH CONFERENCE

The Court: Gentlemen, this examination has reached a point where possibly the Court should change a ruling which it previously made. Under Rule 43 a party may call an adverse party or an officer, director or managing agent of a corporation, partnership or Association, which is an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

[fol. 38] The Court, in connection with the previous ruling, stated that the plaintiff would be permitted to interrogate this witness by leading questions but not to contradict and impeach her. In view of the rule which the Court³ did not have before it at that time, the Court would permit the plaintiff to proceed to contradict and impeach this witness if he so desires.

The Court did not have the rule before it at the time it ruled previously.

Mr. Bird: Will this same ruling of the Court apply to counsel for the defense in presenting Officers, Agents or otherwise of the plaintiff?

The Court: The Court has learned not to anticipate a ruling until it is necessary for the Court to rule.

Under Rule 43, in the opinion of the Court, the plaintiff has this right as far as this witness is concerned. If the defendant calls a witness which falls within the category described in Rule 43(b), the defendant would have the same privilege.

Mr. Bird: May I read that rule a minute?

(The Court then handed the book containing the rule to counsel for his perusal.)

By Mr. Thistle:

[fol. 39] Q. Well, after talking with some women and without any knowledge of who was calling the meeting, you attended this meeting at the Jefferson Hotel in the latter part of June or first of July, 1957?

A. I think some of the women were notified.

Q. Well, I am talking about you personally?

A. Yes, I did.

Q. You had no idea who called it?

A. I think there was notices sent out. I think there was notices sent out to the women.

Q. Do you know who sent them out?

A. I don't remember.

Q. Do you know who furnished the list of names?

A. I couldn't tell you. I don't remember who furnished them.

Q. Can you tell the Court how you happened to attend the meeting?

A. Well, because we had planned to organize the cooperative,

Q. And who advised you as to the details of organizing the cooperative?

A. Well, I think Mr. Bird.

Q. And previous to the date you called or assembled to organize it, how many times did you talk with Mr. Bird?

A. I couldn't tell you.

[fol. 40] Q. That is you may have talked with him a hundred times or you may have talked with him only once.

A. I couldn't tell you.

Q. Haven't any idea?

A. No, I couldn't say offhand.

Q. Well, it is your business that was involved, was it not?

A. Well, I wouldn't say it was my business, no.

Q. You do recall that Mr. Bird addressed the meeting?

A. Yes.

Q. Do you recall anything he said at the meeting?

A. I don't think I could offhand.

Q. How long did he talk?

A. I couldn't tell you that.

Q. You recall you were present all right; no question about that?

A. Yes, I was.

Q. Can you actually tell us approximately how many women were present?

A. I think around forty.

Q. And as a result of this organization meeting, a cooperative was formed?

A. That's right.

Q. And from where was the cooperative to operate its place of business?

[fol. 41] A. At my home.

Q. And were you to continue your previous business independently or were you turning it all over to the cooperative?

A. I turned it all over to the cooperative.

Q. Lock, stock and barrel?

A. That's right.

Q. All your inventory?

A. Yes.

Q. List of names of the women who were doing business with you?

A. I couldn't say as to that.

Q. Your records?

A. No, I didn't turn my records over.

Q. Did they make arrangements for purchase of your inventory?

A. Yes.

Q. Do you recall what they were to pay for the inventory?

A. Well, a lot of articles, different prices, that was priced differently.

Q. Were they to pay you whatever the articles brought when they were on the market when they were sold?

A. They was to pay me what I sold them for, the price that I sold them for.

[fol. 42] Q. That is the price that you sold them for prior to the organization of the cooperative?

A. That's right.

Q. And were they going to pay full price?

A. Yes, what I sold them for.

Q. And in exchange for that, you were going to turn your business over completely to the cooperative?

A. That's right.

Q. And were you elected an officer of the cooperative?

A. Yes.

Q. What office?

A. I started in to be Secretary and Treasurer.

Q. And was someone elected General Manager?

A. I don't recall.

Q. Do you know whether or not you were elected General Manager?

A. I presume I was.

Q. And when did the cooperative start functioning as a cooperative?

A. I don't know as I could recall the date; July 18th, is that right? Somewhere like that.

Q. And they started functioning from your place of residence?

A. Yes.

Q. And with all the tools and equipment and records, [fol. 43] merchandise on hand and everything else that you had previously used in your line of business?

A. Yes.

Q. And from then on they carried it out, continued in business substantially as you had previously conducted your business?

A. I don't just get that question.

Q. And from then on—

The Court: The witness will have to keep her voice up. I can't even hear you, Madam.

Mr. Thistle: Maybe the reporter would read the question.

The Court: The reporter will read the question back.

(The pending question was read back by the reporter.)

The Witness: I don't know as I would know how to answer that one.

By Mr. Thistle:

Q. Well, there weren't very many changes in the business from then on?

A. Yes, there was.

Q. When they first started in, isn't it a fact there were virtually no changes?

A. I can't answer that.

Q. Will you agree that you ran the business as General [fol. 44] Manager from the time it started functioning in July 18, 1957?

A. That's right.

Q. The answer is yes?

A. Yes, I ran the business, yes.

Q. And you have continued to run it as General Manager?

A. That's right.

Q. And it is the same business that you had before the cooperative was organized?

A. I don't know just what you mean by that. It isn't the same business; not the same stores, if that is what you mean; not the same stores.

Q. Oh, you did business with different customers?

A. That's right.

Q. And you obtained different work from additional women? You added to the list of women who were furnishing you goods?

A. Yes.

Q. It was the same type of merchandise you were selling?

A. Yes. I wasn't—I didn't sell it. I didn't sell it.

Q. I am speaking to you in capacity as General Manager of the cooperative?

[fol. 45] A. Yes, but I don't sell it.

Q. But the cooperative was selling to its customers the same type of merchandise?

A. That's right.

Q. And Mr. Bird was President of the organization known as Cooperative?

A. Yes.

Q. Well, now will you tell the Court in your own words why the Cooperative was organized?

A. Well, the women wanted to have a chance to sell their work and after Mr. Gould visited us to start the cooperative, they got together and started it. That is all I can say.

Q. Before getting together, didn't they make an agreement with you as to the business you were operating?

A. Now, I didn't get that question. I don't understand that question. I know just what you mean by that. Will you phrase the question clearer?

By Mr. Thistle:

Q. Did you have any talk with them about what you were going to do with your business?

A. Well, after we organized.

Q. That is, you will have the Court believe that these women got together and organized a cooperative and with-

out any agreement whatsoever with you as to what you [fol. 46] were going to do with the business that you had previously been operating?

A. I don't think I could answer that. I couldn't answer that question.

Q. Don't you recall?

A. I think that the directors—they had a directors' meeting and——

Q. Well, you didn't turn the business over involuntarily to this organization called the Cooperative, did you?

A. Well, I don't know. I stopped doing business and sold my inventory.

Q. And you sold everything else connected with your own business to the Cooperative, didn't you?

A. Yes.

Q. Did they give you a bill of sale?

A. I think they have it already, yes.

Q. Will you produce the bill of sale, please?

A. I think so.

Mr. Thistle: Counsel agrees that there was an agreement of purchase and sale of the entire business that she was operating?

Mr. Bird: Of the inventory.

Mr. Thistle: Of the inventory?

Mr. Bird: Right.

Mr. Thistle: Any mention made of customers?

[fol. 47] Mr. Bird: No mention made of customers, accounts receivable or people from whom she bought.

The Court: Is it so stipulated between counsel that there was an agreement between Mrs. Whitaker and the Cooperative for the sale and purchase respectively of the inventory which Mrs. Whitaker had been using in the business previously conducted by her?

Mr. Bird: And that this agreement was entered into at some date after the formation of the Cooperative.

The Court: It is so stipulated by the defendant?

Mr. Bird: So stipulated by the defendant.

Mr. Thistle: Yes, your Honor. Can it be further stipulated that she was not to engage independently in this line of business?

Mr. Bird: Yes.

Mr. Thistle: May that be added to the stipulation?

Mr. Bird: Well, no I think I will have to say that we can't stipulate to that because the only understanding was that she would work for the Cooperative. There was no limitation put on her outside activities.

Mr. Thistle: And your impression is, Mr. Bird, that she [fol. 48] could have started up as a competitor of the Cooperative?

Mr. Bird: She probably would have been fired as General Manager if she had done that. There was no—

The Court: There is no stipulation of counsel in that respect?

Mr. Bird: No.

By Mr. Thistle:

Q. And what were your duties as General Manager?

A. Well, I take the work in and check it and ship it out and fill the orders that come in and make out the invoices.

Q. And was that substantially the same work you was doing when you were in business alone?

A. No, I did my own selling when I was in my own business alone.

Q. But other than the selling, it was substantially the same, was it not?

A. I would say so, yes.

Q. And did you receive some remuneration for this work?

A. Yes.

Q. What did you receive?

A. I don't think I could tell you offhand.

[fol. 49] Q. Do you have any recollection of a weekly or monthly salary or other remuneration?

A. I am supposed to get \$55 a week.

Q. That is, they have arranged to pay you \$55 a week?

A. Yes.

The Court: Have you been receiving \$55 a week?

The Witness: No.

The Court: How much have you been receiving?

The Witness: I would have to ask Mr. Bird if he has that or Mr. Jacobs if he has it on the record. I couldn't tell you offhand.

Mr. Bird: Your Honor, the records show that Mrs.

Whitaker has received \$1,441 from the Cooperative for her services since the date of the formation of the Cooperative.

The Court: May that be stipulated, Mr. Thistle?

Mr. Thistle: Yes, your Honor.

By Mr. Thistle:

Q. Now, do you have exclusive management of the Cooperative or are there some other people that have or assist in the management?

A. The directors might have something to do with it.

Q. How many directors are there?

A. Five.

[fol. 50] Q. And how often do they meet?

A. Well, at least once a month.

Q. And do they issue instructions to you?

A. Yes, they have.

Q. How often do the members meet?

A. Well, I don't know as I could answer that.

Q. Well, if you had a full meeting—have you had a full meeting of members since you organized in July of last year?

A. Well, no, not all the members were there.

Mr. Bird: Your Honor, may that question be clarified for the witness? The witness obviously did not understand the question.

Mr. Thistle: Would you read the question.

The Court: Well, the witness answered. Counsel inquired as to whether there was a full meeting of the members and the witness answered not all the members were there.

By Mr. Thistle:

Q. Has there been a general meeting of members since July, 1957?

A. Yes.

Q. How many meetings?

A. I couldn't answer that offhand.

Q. Well, has it be one, two or monthly meetings or—
[fol. 51] A. I think they have a record of it.

Mr. Bird: I beg your pardon. May I have that answer read back please?

Mr. Thistle: She said, "I think they have a record of it."

By Mr. Thistle:

Q. As Manager, isn't it a fact that you don't take orders from the individual members—strike that out please.

As Manager, isn't it a fact that you do not take directions and instructions from the individual members?

A. That's right.

Q. You take your orders and instructions from the Board of Directors?

A. That's right.

Q. And the members have virtually nothing to say about how the business is operated?

A. I couldn't answer that because they have a right to.

Q. Well, as General Manager you haven't seen them as a body exercise any direction over your work?

A. I can't answer that.

Q. Well, they haven't given you any orders, have they?

A. I don't know how to answer that question.

Q. You don't recall any orders given you as to how the business should operate given you by the members?

[fol. 52] A. I know they have asked questions when they have—

Q. They made inquiries?

A. Yes.

Q. But they haven't said to you: Now, Mrs. Whitaker, you do this or you do that or do something else; they haven't told you that, have they?

A. (No response.)

Q. Is there an answer?

A. I can't answer that.

Q. Please look at me. You can't answer whether you have any recollection as to whether or not you have received direct instructions or orders from individual members?

A. I don't think so.

Q. And you do think you received your instructions from the Board of Directors?

A. I have, yes.

Q. And isn't it a fact that practically all the women

that were working for you individually transferred over to working for the Cooperative?

A. No.

Q. Is it a fact that the majority of them are now working for the Cooperative?

A. I don't think I—no, I wouldn't think so.

Q. Any of them working for you individually?

A. No.

[fol. 53] Q. Whatever women that were working for you, if they are working at all for any organization with which you are connected, are working for the Cooperative?

Mr. Bird: Objection. I would appreciate it if the counsel could rephrase his question. I sort of get upset when he says "working for." If he could rephrase it. He stated a conclusion of law.

The Court: The objection is sustained. The question would seem to assume a conclusion on the entire issue here involved.

Mr. Thistle: No doubt your Honor will take the viewpoint that the Court will not be governed or controlled by the use of the word "employment" or "work for" or any such conclusion of law in questions asked by counsel because that may come up during the trial.

The Court: The Court appreciates that and the Court will understand that to an extent such language may be used in a nontechnical sense, but in this particular question, perhaps counsel had best rephrase it to avoid that conclusion.

Mr. Bird: I am sure the Court would not be confused by it, but I think perhaps some of the witnesses might be confused.

By Mr. Thistle:

Q. To the best of your knowledge, all of the women who worked for you previously that are now furnishing [fol. 54] any articles to the Cooperative at the present time are not furnishing any articles at the same time to you personally?

A. No, they are not.

Q. That is, they are doing business from the time the

Cooperative was organized with the Cooperative only and not with you individually?

A. That's right.

Q. How many women joined the Cooperative?

A. I believe there was around 200 members.

Q. Have you checked to find out how many of those members worked with you individually or furnished goods to you individually before they became members of the Cooperative?

A. No, I haven't.

Q. Now, under this Cooperative arrangement, isn't it a fact that the women are paid according to the number of items or pieces that they send in?

A. I am afraid I can't answer that.

Q. Well, they are not paid salaries are they?

A. No, they are not, no.

Q. And you are the Treasurer?

A. No, I am not now.

Q. Were you the Treasurer at one time?

A. I was for awhile.

[fol. 55] Q. But you don't know the arrangements under which they are paid?

A. Well, they are paid a certain percentage.

Q. Certain percentage of what?

A. Of what the goods are sold for.

Q. And they are paid this percentage on the particular articles that they send in?

A. That's right.

Q. And if the sale price is the same and one woman sends in three dozen articles, she is paid three times as much as the one who sends in one dozen articles?

A. When her things are sold, she is paid for them.

Q. But eventually she is paid three times as much?

A. That's right; that's right.

Q. And she is paid, is she not, per item that she sends in?

A. Yes.

Q. In other words, she is paid at a piece work rate for the number of pieces that she sends into the Cooperative?

A. Yes.

Q. The arrangement is a piece work arrangement?

A. Well, I don't know how you would phrase that; how to answer that.

Q. And under your arrangement, she gets a preliminary [fol. 56] payment as soon as you can arrange the financing for each piece that she sent in, or she gets a payment on account?

A. Yes, that's right.

Q. With the expectation later if money is made that she will get an additional payment?

A. That's right.

Q. Have you made any additional payments in the last year?

A. Oh, yes, yes.

Q. You have made some additional payments after the sales have been consummated?

A. Do I get that question right?

Q. You made some additional payments after the sales have been finally paid for by your customers?

A. I guess I don't understand just what you mean.

Mr. Thistle: Well, I will strike it out then.

The Court: May the Court inquire for a moment, in an effort to understand this. Mrs. Whitaker, if a member of the Cooperative on June 1st of this year, let's say had sent in a dozen booties, how would she be paid for those?

The Witness: When they were sold, she would be paid for them.

[fol. 57] The Court: If she sent them in on June 1st, would she receive any payment at that time?

The Witness: No.

The Court: Nothing at all?

The Witness: No.

The Court: Now, if those dozen booties were sold on July 1st, what would she receive at that time?

The Witness: As soon as the checks came in, she would be paid.

The Court: Now, how much on July 1st of this year would a dozen booties have sold for?

The Witness: Well, there is different prices.

The Court: Well, pick any rate you might wish.

The Witness: Well, say \$7.50 for fifteen.

The Court: Well, assume that a dozen booties sold for \$10, that is the Cooperative sold them to the Cooperative's customers, how much would this lady who made them receive?

The Witness: About 60 per cent.

The Court: 60 per cent?

The Witness: Yes.

The Court: You say about 60 per cent. How is that—

[fol. 58] The Witness: You want me to explain it, you mean?

The Court: Yes.

The Witness: Well, they pay their salesmen 20 per cent.

The Court: Who pays the salesmen?

The Witness: The Cooperative pays the salesmen 20 per cent, and then the trimming and boxing and so on takes up the other 20.

The Court: The other 20 per cent?

The Witness: Yes.

The Court: And the lady who made the booties gets 60 per cent?

The Witness: Around 60.

The Court: Around 60 per cent. Now these salesmen you speak of, who are they or what are they? Are they employed by the Cooperative?

The Witness: Well, they pay them 20 per cent to sell.

The Court: How many salesmen are there at the present time?

The Witness: Three, I believe.

The Court: Three?

The Witness: Yes.

The Court: And they are paid a commission of 20 per cent approximately on whatever they sell?

The Witness: Yes.

The Court: And then you spoke of 20 per cent going to an embroiderer?

The Witness: No ribbon and boxing and other costs, postage and everything, various costs.

The Court: And who does the packing and embroidery of ribbon and that type of work?

The Witness: Some women that work—

The Court: And how are they paid?

The Witness: By the hour.

The Court: And who pays them?

The Witness: The Cooperative.

The Court: How many of those women are involved?

The Witness: Well, from one to three, usually.

The Court: And they work right in your home?

The Witness: Yes.

The Court: Now, where does your salary come from?

The Witness: The Cooperative.

The Court: And how is that determined?

The Witness: I think they voted to pay me that.

The Court: Well, the Court understands they voted to [fol. 60] pay you \$55 a week?

The Witness: Yes.

The Court: But you have received, since the Cooperative was organized, \$1,441 which, if the Court's arithmetic is correct, would run an average of somewhere around \$20 to \$25 a week?

The Witness: Yes.

The Court: Where did the \$20 or \$25 which you actually received come from?

The Witness: The Cooperative.

The Court: Where did the Cooperative get the money with which to pay you that \$20 to \$25?

The Witness: From sales of goods.

The Court: Well, if 20 per cent of the sales price for each article went to the embroidery costs and packing cost and 20 per cent to the salesmen and 60 per cent to the lady, who made the goods, where do you come in?

The Witness: I think the 20 per cent was reckoned in with the trimming and wages and so on.

The Court: I see, so your salary would come from the 20 per cent which is set aside for trimming, packing and so forth?

The Witness: That's right, yes.

The Court: The Court apologizes, Mr. Thistle, but it is [fol. 61] helpful to get the picture of what is happening.

By Mr. Thistle:

Q. Is Mr. Bird paid a salary?

A. Yes.

Q. What does Mr. Bird receive?

A. He is supposed to get \$50 a week.

Q. Do you know how much he has been paid to date?

A. No, I couldn't tell you.

Mr. Bird: The President, according to the records, has been paid \$1,750 since July 9th of 1957 out of a total of \$2,950 up until September 1st of this year.

The Court: Is it so stipulated?

Mr. Thistle: Yes, your Honor.

And can we stipulate that you have received more money than Mrs. Whitaker?

Mr. Bird: That's right.

Mr. Thistle: It is so stipulated.

The Court: Does the Court understand that the amount stipulated is the amount received by Mr. Bird in his capacity as President of the Cooperative?

Mr. Bird: Excuse me, I am listening to two different things at the same time.

The Court: Does the Court understand correctly that [fol. 62] the amount stipulated, \$1,750, is the amount received by Mr. Bird as the President of the Cooperative during the period?

Mr. Bird: That's right, and that under the contract or the oral agreement of hire that was to be in full payment of all services rendered to the Cooperative, either in a professional capacity as counsel or in a managerial capacity as President of the organization.

The Court: So that would represent the total amount of money received by Mr. Bird in any capacity during this period?

Mr. Bird: That's right. And I believe there is a stipulation in error. The previous stipulation was that Mrs. Whitaker had received less than I had received from the Cooperative. She has been paid on account of the inventory and so that amount that she has been paid on account of the inventory makes her total receipts from the Cooperative excessive to what I received.

Mr. Thistle: Your Honor, the question is directed as to the salary received as a Cooperative Officer and not amounts of money paid for an inventory.

The Court: Well, it has been stipulated between counsel that Mrs. Whitaker received \$1,441 as salary for her services to the Cooperative since it was organized?

[fol. 63] **Mr. Bird:** That's correct.

The Court: And the Court would understand that she has received an additional amount which has not been stipulated

as yet in payment for the inventory which she turned over to the Cooperative at the time it was organized, is that correct?

Mr. Bird: In partial payment, yes.

Mr. Thistle: Could we agree, Mr. Bird, what the inventory price, the agreed inventory price was?

Mr. Bird: It might be interjected in here that the salary or the amounts received by the President has included monies for all expenses that the President has been put to in the course of the years.

The inventory price that the Cooperative agreed to pay Mrs. Whitaker at the beginning of business was \$7,110, and of that amount she has received \$951.

The Court: Is that stipulated? Is that agreed between counsel?

Mr. Thistle: Yes, your Honor:

And was there any additional property delivered other than the actual inventory property?

Mr. Bird: No, just the inventory of the items that she had in her possession at the time the Cooperative commenced business.

[fol. 64] Mr. Thistle: And according to your understanding, Mr. Bird, continuance with the Cooperative was based on the speculation that because she was General Manager she would continue to be or she would stay with the Cooperative as—

Mr. Bird: Well, that was not a condition put upon her being hired as General Manager.

Mr. Thistle: It wasn't formally written out?

Mr. Bird: No, it wasn't even discussed.

By Mr. Thistle:

Q. What duties did Mr. Bird perform as President of the Cooperative?

A. Well, I don't know as I could answer that. He has a lot of things to perform.

Q. Can you tell us some of his duties?

A. I know he has attended every meeting.

Q. And has he advised you people as to the application of the law of cooperatives?

A. Yes.

Q. And has he taken some hand in determining what the conduct of the affair of the Cooperative—

A. I couldn't answer that.

Mr. Bird: Objection. I believe that calls for an opinion of the witness.

The Court: It is overruled. If the witness understands [fol. 65] the question—

Mr. Thistle: Will you read the question, please.

(The last question was read back by the reporter.)

The Court: The question is not complete, Mr. Thistle.

Mr. Thistle: I guess my grammar is off. Then strike it out.

By Mr. Thistle:

Q. Has he participated in the decisions as to the conduct—as to the way and manner in which the business should be conducted?

A. Well, that goes before the Board of Directors every meeting.

Q. He is not a director?

A. No.

The Court: Are you a director?

The Witness: No.

By Mr. Thistle:

Q. Do the Cooperative members have to sell all of their items to the Cooperative?

A. Well, I couldn't answer that.

Q. Under the By-laws, isn't that—

A. I think they are supposed to.

[fol. 66] Now, frankly, Mrs. Whitaker, isn't it a fact that you are doing for the Cooperative about the same type of work and doing it in the same manner in which you ran this personal business of yours before you sold out to the Cooperative?

Mr. Bird: Objection. That's much too general. It calls for an opinion of the witness. He is saying about the same and about this—

The Court: The Court has noted this witness is quite

able to take care of herself, Brother Bird, to date. The objection is overruled.

Mr. Thistle: Will you read it so there can't be any question.

(The pending question was read back by the reporter.)

The Witness: No, I don't think so.

By Mr. Thistle:

Q. Well, in what way is there any change in the conduct and management?

A. Well, I owned my own business then; now I have to do as other people want me to do. I am hired.

Q. Do as the Board of Directors—

A. Yes.

Q. But aside from the direct instructions from the Board of Directors in matters which are within your discretion, [fol. 67] isn't it a fact that you handle those discretionary matters just about the same as when you owned the business yourself?

A. Well, I pack the work, just as I told you, and make—when it comes in, and ship it out; that's all I do.

Q. Don't you help advise the members as to what items are salable?

A. When we have orders come in, they are told sometimes what is on the orders for them.

Q. And what colors are preferable?

A. Yes, we couldn't work any other way.

Q. And what designs are desirable?

A. I might state they make the designs and send them into the salesmen.

Q. Well, under your arrangement; you have, is it seven women in different places who act as collectors of the items and then they send the items in to your place at Troy?

A. No, I don't get that.

Q. Well, after a woman makes an item, how does she get it to your place of business in Troy?

A. Well, she could bring it in or send it by mail.

Q. She doesn't send it to the other directors out in the country?

A. Other directors have brought in some work, yes.

[fol. 68] Q. That isn't the usual practice?

A. Well, quite often they do.

Q. Quite often?

A. Yes.

Q. It is a fact, isn't it, Mrs. Whitaker, that the only profit that the individual workers get is from what you paid for them per piece for the items they furnish you?

Mr. Bird: Objection. That question calls for several conclusions of law, I believe.

Mr. Thistle: It calls for her personal knowledge of—

Mr. Bird: Well, I don't believe counsel has established that she has a personal knowledge. If he wants to ask her if she knows whether or not this happened, all right, but—

The Court: Will the reporter read the question back.

(The pending question was read back by the reporter.)

The Court: The objection is sustained. Possibly counsel can rephrase his question.

By Mr. Thistle:

Q. Mrs. Whitaker, as to the items that the workers furnish you, isn't it a fact that they don't get any other profit or payment for the services other than the payment that [fol. 69] the Cooperative gives them?

A. Now, I don't quite understand that.

Q. We will say somebody furnishes the Cooperative with a dozen items of a particular kind?

A. Yes.

Q. Eventually you pay them on a piecemeal rate so much money?

A. The Cooperative pays them that.

Q. Yes, the Cooperative. Now to your knowledge is there any other income to them or to the particular woman who furnished you the dozen items—

A. We are hoping that it will work out so they will get more pay.

Q. That is, you will be able to increase the rate as the Cooperative is more successful?

A. Yes.

Q. But there is no independent money coming in from them or money from any other source except what the Cooperative pays them?

A. Well, I don't get that question. I really don't.

Q. The only money they get for making the dozen items they send in to you is what the Cooperative pays them?

A. Yes, when they are sold, they pay them.

Q. Did you ever ask any of the women to make a special item or style?

A. Yes.

[fol. 70] Q. Do you know whether all the women that are members of the Cooperative have paid their \$3.00?

A. Yes, they have.

Q. Was one of your customers a year ago a woman by the name of Dorris Law?

A. Yes.

Q. She was doing business under the name of Marilyn Rae Company?

A. Yes.

Q. You were shipping to her fairly regularly?

A. Yes.

Q. And where is she located?

A. In Tennessee.

Q. And is she the same Doris Law who was involved in an action by the Secretary of Labor in regard to furnishing knitted wear, infants' knitted wear?

A. Yes.

Mr. Thistle: And will you agree, Mr. Bird, that she was the Dorothy Law in this particular case?

Mr. Bird: Off the record.

(Discussion off the record.)

By Mr. Thistle:

Q. You do recall that there was some litigation in the courts with this Dorothy Law of Tennessee?

A. Yes.

Q. And in regard to merchandise that you had sent to [fol. 71] her?

A. I wouldn't know about that.

Q. Did you or your attorney ever make a demand for return of merchandise you sent to her?

A. I can't remember. I would have to ask him.

Q. Don't you recall that under the court proceedings a

considerable amount of merchandise that you had shipped to Dorothy Law was impounded by order of the Court?

A. You mean in her case?

Q. Yes?

A. I am trying to think.

Q. Is that right?

A. I remember about the case, yes.

Q. Don't you remember the demand that your attorney, Mr. Bird, made for a return of several hundred dollars worth of merchandise that was impounded in that court action?

A. I will have to let him answer that question because I don't know.

The Court: Was this prior to the Cooperative, Mr. Thistle?

Mr. Thistle: July 29, 1957, right after the Cooperative was formed.

The Witness: The goods were shipped to her before the Cooperative was formed.

[fol. 72] (Copy of letter to Mr. Bird, from Mr. Ray of the Department of Labor in Nashville, Tennessee, dated July 29, 1957, together with copy of letter to Mr. Ray from Mr. Bird, dated July 24, 1957, were marked for identification as Plaintiff's Exhibit No. 4.)

Mr. Thistle: All right, I would like to offer these two documents as copies and not very clear, as pointed out by Mr. Bird, as Exhibit 4.

Mr. Bird: Counsel have agreed that we will endeavor to submit better copies for the Court before the termination of the trial.

The Court: Plaintiff's Exhibit Number 4 has been offered in evidence. Any objection?

Mr. Bird: No objection, your Honor.

The Court: It may be admitted.

Mr. Thistle: Your witness.

The Court: Does that complete the direct examination?

Mr. Thistle: Yes, your Honor.

The Court: The Court will recess at this time until 10 o'clock tomorrow morning.

(Whereupon, the Court adjourned for the day at 4:15 o'clock, p.m.)

[fol. 73] (This matter came on for further hearing before the Honorable Edward T. Gignoux, Judge, United States District Court, District of Maine, commencing at 10:00 o'clock, a.m., Wednesday, September 24, 1958. Appearances were as previously noted.)

The Court: Brother Thistle?

OFFERS IN EVIDENCE

Mr. Thistle: Your Honor, the plaintiff would like to renew its offer as evidence three sets of Admissions and Interrogatories propounded by the plaintiff to the three defendants, the Cooperative, Mr. Bird and Mrs. Whitaker, and also the answers filed in court to those requests for Admissions and Interrogatories.

The Court: That offer would be of all of the Interrogatories and Requests for Admissions of fact which have been filed, Mr. Thistle?

Mr. Thistle: Yes, your Honor.

The Court: Is there objection?

Mr. Bird: No objection, your Honor.

The Court: They may then be admitted.

Mr. Thistle: Your Honor, the counsel for the defense furnished the plaintiff with a copy of the Articles of Organization and the meetings of the Board of Directors and a meeting of the members for my perusal, and I have no [fol. 74] objection to such copy or the originals being admitted as records but not for proof of the matters commented upon.

The Court: The Court would suggest that the record book be identified as Defendant Exhibit Number 1.

Mr. Bird: Your Honor, may I have the privilege of introducing the record book only temporarily so that the original can be later withdrawn and a copy substituted?

The Court: That privilege will be accorded. It should, however, be identified as an exhibit and formally offered, Mr. Bird.

Mr. Bird: Yes, your Honor.

The Court: There are two separate documents, Mr. Bird?

Mr. Bird: Yes, your Honor.

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The Court: Perhaps the Certificate of Incorporation could be marked for identification as Defendant's Exhibit Number 1.

Mr. Bird: Yes, your Honor, and may we also have the same privilege in regards to this document of having it returned as this is the only original we have.

The Court: Yes, and the Court will permit the withdrawal of the original upon substitution of a—
[fol. 75] Mr. Bird: Certified true copy?

The Court: Or a photostatic copy satisfactory to both counsel.

(The Certificate of Corporation of Whitaker House Cooperative, Inc. was marked for identification as Defendant's Exhibit Number 1.)

The Court: Defendant's Exhibit Number 1 is then admitted in evidence, there being no objection.

Mr. Thistle: There are no objections, your Honor.

Under the reservation made, it is not proof of the actual facts but merely proof of a record.

(The Minute Book of Whitaker House Cooperative, Inc., was marked for identification as Defendant's Exhibit Number 2.)

The Court: The Minute Book has been marked as Defendant's Exhibit Number 2?

The Clerk: Yes, your Honor.

The Court: And there being no objection, it is admitted in evidence with the same understanding with respect to substitution?

Mr. Bird: Right. This is the Minutes of the Articles of Association, the Minutes of the Meetings of the member-
[fol. 76] ship and the Minutes of the Board of Directors.

The Court: Thank you, Brother Bird.

Mr. Thistle: Your Honor, I inquired this morning of the counsel for the defendants as to whether or not Mrs. Whitaker gave a formal Bill of Sale at the time of the transfer to the corporation in July of 1957, and he advises me that no formal Bill of Sale was given, and therefore I ask that that be stipulated in the record.

The Court: That no formal Bill of Sale—

Mr. Thistle: Yes, your Honor.

The Court: Is it so stipulated?

Mr. Bird: It is so stipulated. I would like to expand upon that if I may.

The records of the Board of Directors' Meetings—the second meeting discloses that the directors agreed to buy the inventory of Mrs. Whitaker and also the accounts receivable, but upon audit, it appeared that there were no accounts receivable, and after the inventory was taken by Mrs. Nutter and one other lady, the amount of the inventory was turned over to the bookkeeper and auditor for entry into the records of the Cooperative.

Mr. Thistle: And could we further stipulate that?

[fol. 77] The Court: Is that stipulation accepted by the plaintiff, Mr. Thistle?

Mr. Thistle: I would like further statement on that that we can agree on that in transfer—

Mr. Bird: I mean Mrs. Whitaker.

The Court: The Court will understand you are referring to Mrs. Whitaker and the record will so show.

Mr. Thistle: As I understand it, Mr. Whitaker transferred a going business and without any reservation, and I would like to have it so appear in the record that she made no reservations.

Mr. Bird: I think that's—

(Counsel conferred in subdued tones.)

The Court:—The Court is going to have to differentiate between stipulation between counsel and testimony. This last exchange would appear to be in neither category.

Mr. Bird: Right, your Honor.

The Court: Is there a stipulation with respect to the transfer from Mrs. Whitaker to the Cooperative with respect to which counsel can agree at this time.

Mr. Thistle: We agree, your Honor, that she transferred [fol. 78] her complete inventory and accounts receivable.

The Court: Is that stipulation accepted?

Mr. Bird: Yes, with the further addition that upon audit, it was found that there were no accounts receivable.

The Court: Is that additional stipulation accepted?

Mr. Thistle: Yes, your Honor.

The Court: It is understood then that the parties have stipulated or agreed that Mrs. Whitaker transferred to the

Cooperative the inventory and accounts receivable of her individually owned business but that on subsequent audit, it was found that there were no accounts receivable to be transferred.

Mr. Thistle: And, I think Mr. Bird—

The Court: Proceeding to that point, is the stipulation as stated by the Court the stipulation of counsel, Mr. Bird?

Mr. Bird: Yes.

The Court: Mr. Thistle?

Mr. Thistle: Yes, your Honor, but I would like to add, and I thought Mr. Bird agreed that the good will was also transferred.

Mr. Bird: I will have to agree to that, and it will come out [fol. 79] in the testimony the conditions under which that was done.

The Court: Then it is further stipulated between counsel that Mrs. Whitaker also transferred to the Cooperative the good will of the business, is that correct, Mr. Bird?

Mr. Bird: Yes, your Honor.

The Court: Mr. Thistle?

Mr. Thistle: Yes, your Honor.

The Court: May the Court inquire with respect to the previous stipulation, yesterday afternoon there appeared to be indications that while there was no formal written Bill of Sale there was a written Purchase and Sale Agreement?

Mr. Bird: No, in reviewing the record—this is amending that. Upon reviewing the record last night, all I could find was my memorandum of the Agreement; that nothing was ever reduced to writing between the parties.

(Copy of letter from Thomas L. Thistle, Regional Attorney, to Philip S. Bird, Esq., dated August 2, 1957, was marked for identification as Plaintiff's Exhibit No. 5.)

Mr. Thistle: I would like to offer this copy of a letter as Plaintiff's Exhibit 5, your Honor. Mr. Bird agrees.

[fol. 80] The Court: Plaintiff's Exhibit Number 5 has been offered in evidence. Is there objection?

Mr. Bird: No objection, your honor.

The Court: It may be admitted.

Mr. Thistle: Your Honor, in the pretrial brief furnished by the defendants' counsel, the defendant quoted from a law of Cooperatives, 3rd Edition, and I would like to address the

Court's attention, to two or three quotations from this volume, if Mr. Bird has no objection.

~~The Court: Could counsel defer until argument on that?~~
It would appear at this time with the witnesses in the courtroom, we might proceed most expeditiously if we completed the record and then opportunity would be provided to supplement that record with any argument or citations which counsel would wish to call to the Court's attention.

Mr. Thistle: I would like to have Mrs. Whitaker resume the stand.

EVELYN WHITAKER resumed the stand, was reminded she was still under oath, and testified further as follows:

Direct examination continued.

By Mr. Thistle:

[fol. 81] Q. Your name is Evelyn Whitaker?

A. Yes.

Q. And you testified yesterday?

A. Yes.

Q. I am showing you a carbon copy of a paper entitled "Articles of Association of Whitaker House Cooperative, Inc., and you will notice on the bottom there is listed 28 names. Will you look those over and refresh your recollection and inform the Court as to whether or not, with the exception of your own name, those persons worked for you before the Cooperative was organized?

A. Yes, I bought work from them.

The Court: The Court could not hear you, Mrs. Whitaker.

The Witness: I bought work from these people.

By Mr. Thistle:

Q. Did you attend the Annual Meeting of the members June 26th at a cafe in Bangor, Maine?

A. Yes.

Q. And—

The Court: June 26th of what year, Mr. Thistle?

Mr. Thistle: 1958.

By Mr. Thistle:

Q. And you—

[fol. 82] Mr. Thistle: And it is agreed, your Honor, that it may be so stipulated by agreement of counsel that on June 26, 1958, the Cooperative had 195 members.

The Court: Is it so stipulated, Mr. Bird?

Mr. Bird: It is so stipulated, your Honor.

By Mr. Thistle:

Q. Do you recall how many members were present at that meeting?

A. I think it was 38.

Q. Showing you the Secretary's Report of the Annual Meeting, June 26, '58, and pointing out a statement there, does that refresh your recollection?

A. Yes, I think it does.

Q. And does this statement read, "The number of members present was "37"?"

A. Yes, that's right.

Q. Was there any call for that Annual Meeting? Do you know what I mean by a call or a notice?

A. I think there was a notice on that.

Q. And can you furnish me or furnish the Court with a copy of the notice sent out for that Annual Meeting?

A. No, I couldn't.

Mr. Bird: May it please the Court. Do you want a copy [fol. 83] of that notice to submit now?

Mr. Thistle: Yes.

Mr. Bird: I will find it after she finishes.

By Mr. Thistle:

Q. Now, you are familiar with the By-laws of the Whitaker House Cooperative, Inc.?

A. Well, I read them over several times.

Q. And pointing out Article 7, Section 5, does it read, "Fifty-one per centum of the members shall constitute a quorum at any meeting . . . "?

A. Yes, but they have had that Article amended, I think.

Q. When was this Article amended?

A. At the Annual meeting.

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Q. At this particular meeting?

A. Yes.

Q. And will you agree that if the meeting was not—if a quorum was not present, a legal meeting could not be held?

Mr. Bird: I will have to object to that question, your Honor.

The Court: Sustained.

Q. Will you agree that 51 per cent of 195 is at least 90?

A. No.

[fol. 84] Q. Could you take time to figure it out with the assistance of your —

The Court: Well, Mr. Thistle, certainly the record here would speak for itself. If there were 37 members present and 195 members in the Cooperative, the Court could take judicial notice of the fact that 51 per cent of the total membership was not present at this meeting.

Mr. Thistle: And that therefore a quorum was not present?

The Court: Well, that would appear to be a legal question under the provisions of the By-laws, and it is difficult to see how this witness could enlighten us as to the interpretation of those.

By Mr. Thistle:

Q. What is the usual lapsed time between the time you receive articles from the members to the time that you receive a check from the people to whom you sell these items?

A. Well, that varies.

Q. Would it be, you think, two or three weeks or a month or two months?

A. Well, it varies.

Q. One person pays promptly and on another occasion, not so promptly?

A. That's right.

[fol. 85] Q. And also it varies according to how fast the merchandise moves off your shelves?

A. That's right.

Q. And is sent to the customer?

A. Yes.

Q. You gave the statement yesterday that the actual net receipts for merchandise was divided 60 per cent to the knitter and 20 per cent for sales, reserve for sales, and 20 per cent for overhead?

A. Yes.

Q. Now, do you intend to convey the idea that that was the arrangement from the start?

A. I couldn't answer that because I don't have anything to say about it.

Q. Well, you told the Court that was the arrangement. During what period was that the arrangement?

A. I couldn't answer that question.

Q. Do you want to qualify your statement yesterday that there was an arrangement of 60-20-20 but you don't know what period it covered?

A. What do you mean "what period", from the starting of the—

Q. The time when it started and how long it continued?

A. Well, from the very beginning of the Cooperative.

Q. Your statement now is from the very beginning of the organization or setting up of this Cooperative business, [fol. 86] a division was made, 60 per cent to the worker, 20 per cent for salesmen and 20 per cent for overhead?

A. About 40 per cent, yes.

Q. And that started in the first day you started to operate?

A. I think that was set up about that way.

Q. I would like to call your attention to a meeting of the Directors on August 22, 1957, and will you read from this word "Upon" that I am pointing out, will you read that sentence?

A. Yes.

Q. Read it to the Court?

A. "Upon a motion seconded and passed, it was ordered that all the goods submitted by the members for sale should be in before the 10th of the month and would be paid for on or before the 20th of that month."

Q. That is, in other words, any goods you received up to the 10th of the month or as to any goods you received up to the 10th of the month, you paid the members on the 20th of the month?

A. When we could.

Q. No, I am speaking about this motion?

A. Yes, I know.

Q. That was a motion, was it, of the Board of Directors?
[fol. 87] A. Yes, they would be paid within 10 days of the 10th.

Q. Was 10 days a sufficient time for you to, as General Manager, to sell all the merchandise that you had received by the 10th and get your check back by the 20th?

A. No.

Q. Well, then at that time you were not making a division on the proceeds received from customers?

A. I don't think I could answer that because I don't write the checks.

Q. You were Treasurer in August, weren't you?

A. In August? I don't remember.

Q. I beg your pardon?

A. I don't remember when I resigned; what date it was.

Q. You were the Manager anyway?

A. Yes, I was.

Q. And don't you know that 10 days was too short a time for you to take the merchandise off your shelf and send it to customers and get the money back so you could make a division of 60-20-20?

A. Well, I might explain that the goods were sent in and there was a whole month beside the 10 days before they got any checks.

Q. Well, I am speaking of the goods that arrived approximately on the 10th of the month?

[fol. 88] A. They didn't get their pay in 10 days when we organized, after we organized.

Q. 10 days was too short a time for any such completion of sales —

A. That's right.

Q. So as to get your money back?

A. That's right.

Q. And yet the Board of Directors passed a vote, and you worked under their direction, that all merchandise received by the 10th would be paid for by the 20th?

A. Well, that vote wasn't passed at the beginning of the Cooperative, was it?

Q. Well, I have shown you a meeting of the Board of

Directors held at Troy on August 27th, '57. You were present at the meeting, weren't you?

A. I was. But we had a month there to go and come on for sales.

Q. I am confining my question now to the merchandise received on or shortly before the 10th or on the 10th of the month as to that particular merchandise under that Board of Directors' vote, you were supposed to pay the members by the 20th?

A. Well, that was the vote, yes.

Q. And you followed your Board of Directors' votes, didn't you?

A. Yes.

[fol. 89] Q. They were the people that gave you the orders and instructions as to how to run the business, didn't they?

A. That's right.

Q. They held a monthly meeting?

A. Yes.

Q. Between the monthly meeting you ran the business as you saw fit, unless you had any particular directions?

A. Yes.

Q. That is, you were in full charge of the Cooperative between the monthly meetings unless you received some special instructions?

A. Yes.

Q. And those instructions came from the Board of Directors and not from a general assembly of the members?

A. Well, I could say that some of the members could vote if they wished to.

Q. Some of the members what?

A. Could vote if they wished to or have something to say.

Q. As members of the Board of Directors?

A. No, members of the Cooperative.

Q. As members of the general meeting?

A. Yes.

[fol. 90] Q. But in order to vote at the general meeting you had to have a general meeting called, didn't you?

A. Yes.

Q. And the only general meeting called was on June 26, 1958?

A. Yes.

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Q. That is the Annual Meeting?

A. Yes.

Q. And that Annual Meeting was the one that although you had 195 members, you only had 37 members present, that's right, isn't it?

A. Yes.

Q. And there wasn't a quorum?

A. I think that was amended before they started the meeting.

Q. May I direct your attention to Amendment of the By-laws, Article 13, Section 2, and doesn't that read: "The By-laws of the Cooperative may be altered, amended, rescinded or added to by the vote of a majority of the members present at a special meeting convened for such purpose or at a regular meeting, but the notice of the special or regular meeting, must set forth fully and clearly the proposed alteration, amendment, rescission or addition."

That's how it reads, isn't it?

A. Yes.

[fol. 91] Q. And don't you interpret that to mean that before a regular meeting could make an alteration, amendment, rescission or addition, there had to be a legally called regular meeting with a notice, isn't that your interpretation of it?

A. Yes.

Q. And if there wasn't a legally called regular meeting, you couldn't make an alteration that would reduce the number of members present from a majority of the members to 25, will you agree to that?

Mr. Bird: Objection, your Honor.

The Court: Sustained.

By Mr. Thistle:

Q. Did you drop any members for substandard work?

A. I think there was two in the—the directors talked about in the Minutes of the meeting.

Q. I am reading this report of the Minutes of the Meeting of January 21, '58. Will you tell us the number that was dropped for substandard work without mentioning their names?

A. Three.

Q. Now, I notice in the reports of these directors' meetings, August 27th, 1957; March 6th, 1958, and of the general meeting in June the 26th, '58, there was mention of a Mrs. Law?

A. Yes.

[fol. 92] Q. Is that the woman in Tennessee?

A. Yes.

Q. To whom you shipped merchandise?

A. Yes.

Q. Were you paid for all the merchandise you shipped her?

A. I think so.

Q. Doesn't she still owe you some money for merchandise that was impounded?

A. Do I have to answer that?

Mr. Thistle: I think it is pertinent, your Honor.

The Court: The Court would instruct you to answer, in the absence of any objection from your counsel.

The Witness: I have been paid for all of it.

By Mr. Thistle:

Q. Is that the same Mrs. Law against whom a court action was pending?

A. Yes.

Q. In the United States District Court at Tennessee?

A. I think so.

Q. Dorris Law?

A. Yes.

The Court: Mrs. Whitaker, when you say, "I have been paid," you mean personally or the Cooperative?

[fol. 93] The Witness: No, I was personally paid.

Q. Now, in May of this year, were you paying members in full for work they had done?

A. I haven't paid any members.

Q. As General Manager of the Cooperative, do you know whether or not the members were being paid in full?

A. No, I don't think they were.

Q. What arrangements, if any, were made in the June 15, '58, meeting?

A. I think they arranged to pay half; the directors did.

Q. Pointing out the meeting to you, will you read, if this is correct, from the meeting of the Board of Directors of May 15, '58, this statement? Is that a correct statement?

A. That statement was made, yes.

Q. And will you observe me as I read it. "Motion was made by Mrs. —"

The Court: Is there an objection?

Mr. Bird: I would like to have that gone over again. I didn't get that. I was trying to find it.

The Court: The witness has not identified the statement as yet.

Mr. Bird: Well, what is your question to the witness?

[fol. 94] Mr. Thistle: I was going to ask her to read it or I would read it and she would verify my reading.

Mr. Bird: Well, it is in the record. Would you ask the witness if she personally knows whether or not that motion was made?

By Mr. Thistle:

Q. Do you recall this motion having been made at the meeting?

A. I honestly can't recall it.

Q. Do you recall any conversation or any motion or discussion at the meeting as to partial payments to members?

A. Yes.

Q. On a percentage basis?

A. Yes.

Q. And any limitation on it?

A. No.

Q. Will you read this statement here. Does that refresh your recollection?

A. I remember that, yes.

Q. You remember it and does it read: "These payments to be made only if there is sufficient money in the Cooperative account over and above the note fund"?

A. Yes.

[fol. 95] Q. And refreshing your recollection again from the record of this meeting, is there any statement in this that members would be paid 60 per cent of the actual receipts from the purchasers, from the Cooperative?

Mr. Bird: Which meeting is this you are referring to?

Mr. Thistle: May 15, 1958.

Q. You don't find any statement in the report of this meeting?

A. I didn't understand what you mean.

Mr. Thistle: Would you kindly read the question?

(The last question was read back by the reporter.)

The Witness: Any statement about what?

Mr. Thistle: You will have to go back further, Mr. Reporter.

(The following question was read back by the reporter:

“Q. And refreshing your recollection again from the record of this meeting, is there any statement in this that members would be paid 60 per cent of the actual receipts from the purchasers, from the Cooperative?”)

The Witness: No.

[fol. 96] By Mr. Thistle:

Q. You were present at virtually all the meetings of the Board of Directors?

A. I was there at all meetings.

Q. Now showing you a list or showing you a typewritten copy of the meetings of the Board of Directors, will you point out if there was any vote by the Board of Directors in any of their meetings which stipulated that those furnishing infants' wear would be paid 60 per cent of the eventual sale price obtained from your customers?

A. I didn't state that they were paid 60, I said they would be figured about 60 per cent.

Q. Oh.

A. I said about.

Q. Oh, on the percentage basis or on the method by which you paid them—

A. Which they were paid.

Q. Yes, eventually they realized about 60 percent of what you received from the customers; that is what you meant to say?

A. Yes, that is what I meant.

Q. That is, you were merely stating the percentage rather than a firm agreement to pay them 60 per cent?

A. We was always hoping that there would be more money in so they could have more money for their goods. [fol. 97] Q. Hoping and expecting but no firm agreement that they were always to be paid 60 per cent?

A. Oh, no, no agreement like that.

Q. No firm agreement?

A. No.

The Court: What was your understanding or the Cooperative's understanding with the membership—with the members as to how they would be paid?

The Witness: Well, when the work was sold and the returns came in that they was to be paid.

The Court: And how was the amount they were to be paid determined?

The Witness: Well, the directors determined that because sometimes we had a stock on hand that wasn't sold and it set there for quite a time, and we didn't get the money in to pay them.

The Court: Well, again, Mrs. Whitaker, the Court is simply trying to obtain an understanding of what your arrangement was?

The Witness: That's what I want them to do.

The Court: If a particular lady sent in a dozen booties—

The Witness: Yes.

The Court:—and that dozen booties was sold for \$10.00 a month after this lady sent them in, how would it be [fol. 98] determined as to what part of that \$10.00 she would receive?

The Witness: Well, I think that she was paid about 60 per cent. I say "about." And then the rest left in until the end of the year.

The Court: Who decided that it would be 60 per cent and not 65 per cent or 55 per cent?

The Witness: I don't know as anyone did.

The Court: Well, someone must have signed a check and decided on the amount of the check?

The Witness: Well, Mrs. Banton wrote the checks.

The Court: She is the Treasurer?

The Witness: Yes.

The Court: Was it entirely up to her as to how much she would pay a particular lady?

The Witness: No, they voted at the meetings.

The Court: At the Directors' Meetings?

The Witness: Yes.

The Court: The Directors would vote and instruct the Treasurer, Mrs. Banton, to pay all of the ladies 60 per cent or a particular lady 60 per cent?

The Witness: Sometimes they couldn't pay all of that 60 per cent, because there wasn't money enough in to pay it.

[fol. 99] **The Court:** But does the Court understand correctly that the Directors voted that the ladies would be paid 60 per cent if that amount of funds was available?

The Witness: Yes, that's right.

The Court: Now was that a vote which was recorded in the Minutes of any meeting?

The Witness: I don't recall. I really don't recall whether it was or not.

By Mr. Thistle:

Q. Do you wish to change your testimony from the testimony you made a few minutes ago that there was no firm agreement on 60 per cent?

A. Did I make the statement that there was?

Q. Yes, I repeatedly asked you whether or not there was a firm agreement and you stated two or three times there was no agreement but they realized about 60 per cent, isn't that what you testified?

A. I think I am rather mixed up on that because I know that they haven't been paid 60 per cent.

Q. Are you mixed up on what you told the Court?

A. No.

Mr. Bird: I believe the question was: Was there any firm agreement with the members that they would be paid 60 per cent, and I believe the answer was there was no firm agreement with the members. He is now discussing the [fol. 100] agreement the directors may have made.

By Mr. Thistle:

Q. Was there any vote of the Board of Directors that authorized the Treasurer to pay members 60 per cent of the amount realized from your customers?

A. Not to my knowledge.

Q. You were present at every meeting?

A. I was present.

Q. Now, isn't it a fact that the individual members do not have an equal voice with the directors in the management of this Cooperative?

A. I believe in the By-laws they have a chance to vote, don't they?

Q. But other than what chance they have to vote in the By-laws, do you know of any provision in the By-laws that gives the members equal voice in the management with the directors?

A. I can't answer that.

Q. Well, you are familiar with the By-laws, aren't you?

A. I have read them several times.

Q. Can you point out anything in the By-laws that show that the individual members have equal vote with the directors?

[fol. 101] Mr. Bird: Your Honor, I think I will have to object to that. The By-laws are subject to the interpretation of the Court and this is asking for, I believe, a legal interpretation of the respective legal rights and liabilities of—

The Court: The Court would suggest that perhaps we could save some time, Mr. Thistle. The Court will state its understanding, sir, that under the bylaws and in actual fact the members of this Cooperative were entitled to and did elect the directors and that the directors as so elected were responsible for the direction and management of the Cooperative and that the President, Treasurer and General Manager were subject to instructions given to them directly by the directors and certainly not directly by the members as individuals.

Is that understanding of the Court one which counsel could stipulate?

Mr. Thistle: It strikes me, your Honor, that is a fair summation of the managerial arrangement.

The Court: Brother Bird?

Mr. Bird: I think that is a fair statement, your Honor, and I would agree to having that included in the evidence as a stipulation.

Mr. Thistle: And could it be further stipulated that other than voting for these officers, the individual members [fol. 102] have no voice in the management?

Mr. Bird: No, I cannot stipulate as to that.

Mr. Thistle: Well, then stipulate—

The Court: Well, what other points would counsel suggest they might have?

Mr. Bird: The record will disclose that at several of the Board of Directors' Meetings there were several members present who are not directors or officers and they joined in the discussion as much as they wanted to and that often times before the directors voted on anything or discussed anything, it was open for general discussion, so I would not say that they did not have an opportunity to use their persuasive influence on the management.

The Court: But counsel would possibly agree that under the By-laws they had no right to be present at Directors' Meetings or to exercise any control or management over the Cooperative?

Mr. Bird: I would say that that question of whether they had a right to be or not to be at the meeting is not covered by the By-laws. They were certainly not excluded from the meeting by the By-laws and the evidence will show that the meetings were always open to the members and that [fol. 103] several of them did take the opportunity to be present at the meetings and that the directors at one meeting I can think of in particular directed that a special invitation be sent to the members to ask them to attend if—

The Court: The Court understands that counsel are in agreement with the initial statement as made by the Court concerning the relationship under the By-laws of the members, directors and officers of this Cooperative, is that correct, Mr. Bird?

Mr. Bird: Yes, your Honor.

Mr. Thistle: Yes, your Honor.

By Mr. Thistle:

Q. Did you have an officially appointed Assistant Manager or did you do all the managerial work personally?

A. I do the work.

Q. Isn't it a fact that your method of payment was to make an estimate of what the eventual sales price was and then make an advancement—will you strike that out.

Isn't it a fact that your arrangement with the members was for you, as Manager or Treasurer, to make an estimate

or calculation on what particular items of merchandise would be sold for and then make an advancement to the members on account?

A. I don't know how to answer that.

Q. Well, if you paid a woman, we will say, \$9.00 for a [fol. 104] shipment, how did you figure out that she should pay her \$9.00? What basis did you use for determining how she should send the check for \$9.00?

A. I might say that the money was divided up on account that came in.

Q. In fact, you paid what you could afford to pay her as an advancement depending upon how much money there was in the treasury?

A. That's right; that's right.

Q. And the matter was frequently controlled by whether or not the treasury was in good standing with funds?

A. That could be right.

Q. At some time did the Cooperative borrow several thousand dollars?

A. Yes.

Q. When was that?

A. Well, I would have to ask the accountant when the date was.

Mr. Bird: I believe it was April 21st. I can check through here and find it.

Q. Would April, 1958, refresh your recollection?

A. I couldn't tell you the exact date.

Q. Could you furnish a statement as to—well, strike that out, and I will ask you this question.

[fol. 105] At some time you did, or the Cooperative did, borrow several thousand dollars?

A. Yes.

Q. And have you a statement as to how that money was disposed of?

A. I haven't, no.

Q. You can't furnish us with a statement?

A. No.

Mr. Thistle: Your witness.

The Court: May the Court may a few inquiries before before cross-examination.

Mr. Bird: Yes, your Honor.

By the Court:

Q. From whom was this money borrowed by the Cooperative, Mrs. Whitaker?

A. Who borrowed the money?

Q. From whom, was it from a bank or—

A. Yes, from a bank.

Q. From a bank in—

A. Waterville.

Q. And—

A. Well, I believe it is through the Unity Branch.

Q. Of a bank and there was a note, a promissory note?

A. Yes.

[fol. 106] Q. And it was signed by the—

A. It was signed by some of the directors.

Q. Of the Cooperative?

A. And the Vice President.

Q. And was it signed by you?

A. No.

Q. Was it signed by the directors, and the Vice President, on behalf of the Cooperative or personally?

A. I don't know as I could answer that. Mr. Bird could answer that.

The Court: Well, perhaps—

Mr. Bird: Your Honor, I believe if the counsel will stipulate to it, the note was in the amount of \$5,000 from the Federal Trust Company, Unity Branch. It was signed on the face of the note by the President, Philip S. Bird, and by the Treasurer, Ella Mae Banton, and it was endorsed on the back of the note by three of the directors and the Vice President, John Kennedy. I can't recall just offhand which of the directors endorsed it, but we could get that from the records here somewhere.

The Court: And the directors would be personally—a personal endorsement by the Vice President and directors?

Mr. Bird: Well, I will get into testimony here.

[fol. 107] The Court: Can it be stipulated as to the note?

Mr. Thistle: Yes, your Honor.

The Court: It can be further stipulated that the note was not signed or endorsed by Mrs. Whitaker personally?

Mr. Bird: Yes.

The Court: Mr. Thistle?

Mr. Thistle: Yes, your Honor.

It was endorsed by the Vice President, John Kennedy, and three directors, individual endorsements on the—

By the Court:

Q. Mrs. Whitaker, the record which the Court has before it which is Defendant's Exhibit Number 2 indicates that on July 18, 1957, when the Cooperative was organized, certain directors were elected?

A. Yes.

Q. The Court wishes to inquire as to whether any of these directors were in any way related to you personally?

A. No, they wasn't.

Q. Had those directors been associated with you in any business activity?

A. Yes, I had bought work from some of them.

[fol. 108] Q. Certain of the directors were ladies who had furnished work to you?

A. Yes.

Q. In your individual capacity?

A. Yes.

Q. That would include Mrs. Loubier?

A. Yes.

Q. Mrs. Banton?

A. Yes.

Q. Mrs. Leavitt?

A. Yes.

Q. Mrs. Boyington?

A. Yes.

Q. Mrs. Edmonds?

A. Yes.

Q. Had any of those five ladies been associated with you in any other capacity?

A. No.

Q. Previous to the organization of the Cooperative?

A. No, no.

Q. They have not worked with you in your home or in your office or—

A. No.

Q. —in any salaried position?

A. No.

[fol. 109] Q. Now the records of the meeting of the Board of Directors held on July 9, 1957, for the purpose of electing

officers of the Cooperative indicate that at that meeting Mrs. Dana Banton was elected Chairman of the Board of Directors?

A. I believe so.

Q. Was she or is Mrs. Banton related to you in any way?

A. No.

Q. Had she been associated with you in business in any way?

A. No.

Q. Was she one of the ladies who had supplied knitted goods to you?

A. Yes.

Q. The records show that Mr. Philip S. Bird was elected President?

A. Yes.

Q. Had Mr. Bird been associated with you in any way previous to—

A. No.

Q. —the organization of the Cooperative?

A. No.

Q. Had he been your attorney prior to the time when you considered organization of the Cooperative?

A. In June.

[fol. 110] Q. In June of 1957?

A. Yes.

Q. But previous to that time, he had not represented you as attorney?

A. No.

Q. And he is not related to you in any way?

A. No.

Q. The records also show that Jack Kennedy was elected Vice President?

A. Yes.

Q. Is Mr. Kennedy a relative of yours?

A. By marriage.

Q. What is his relationship to you?

A. A cousin to my husband.

Q. Your husband's first cousin?

A. Yes.

Q. Had Mr. Kennedy been associated with you in business in any way before?

A. No.

Q. What is Mr.—what at that time was Mr. Kennedy's business if you know?

A. Well, I think he is retired.

Q. And what had his business been previous to his retirement?

A. Electrician, I think.

Q. An electrician and—

[fol. 111] A. Yes.

Q. —had he in any way been associated with you in your own business prior to the organization of the Cooperative?

A. No.

Q. Mr. Kennedy's home is where?

A. Vassalboro.

Q. Vassalboro, Maine?

A. Yes.

Q. Was Mr. Kennedy to receive a salary as Vice President?

A. No, there was no mention of it.

Q. No mention of salary?

A. No.

Q. Has he in fact received any salary or any compensation from the Cooperative?

A. No.

Q. The records also show that you were elected Secretary-Treasurer at that meeting?

A. That was '57, yes.

Q. If you know, Mrs. Whitaker, was there any change in the officers or directors of the Cooperative between the dates of the meetings to which I have just referred and the Annual Meetings which were held, the Annual Meeting of the members which was held on June 26, 1958, of this year?

[fol. 112] A. Two of the directors were changed.

Q. Two of the directors were changed?

A. Yes.

Q. Which were those?

A. Mrs. Loubier and Mrs. Boyington.

Q. Did Mrs. Loubier resign?

A. Yes.

Q. For what reason?

A. I believe she couldn't attend the meetings as often as she thought she could or should.

Q. How old is Mrs. Loubier approximately?

A. I wouldn't know.

Q. Is she an elderly lady?

A. No, middle aged.

Q. And was another director elected to replace Mrs. Loubier?

A. Yes.

Q. And who is that?

A. Mrs. Miller.

Q. Mrs. Miller?

A. Yes.

Q. And is Mrs. Miller in any way related to you?

A. No.

Q. Had she been associated with you in business in any way?

A. No.

[fol. 113] Q. Was she one of the ladies furnishing goods to you?

A. No.

Q. Prior to the organization of the Cooperative?

A. No.

Q. Is she one of the ladies furnishing goods to the Cooperative now?

A. That's right.

Q. And the other lady who resigned was Mrs. Boyington?

A. Yes.

Q. Why did she resign?

A. She was ill and couldn't keep on, couldn't attend the meetings.

Q. Is she elderly, middle-aged, or young?

A. She is elderly.

Q. Who was elected to replace her?

A. Matilda Ireland.

Q. And is Mrs. Ireland in any way related to you?

A. No.

Q. Had Mrs. Ireland been associated with you in business in any way?

A. No.

Q. Is she one of the ladies who supplied you with work prior to the organization of the Cooperative?

A. Yes.

[fol. 114] Q. And she is presently supplying work to the Cooperative?

A. That's right.

Q. Were these two ladies elected to replace the two who resigned by the directors or by the members?

A. I think by the vote of the members.

Q. Would that have been at the Annual Meeting?

A. Yes.

Q. Now was there any change in the officers between the date of the organization meeting and the date of the Annual Meetings in June '58?

A. No, only just myself as Treasurer; I resigned.

Q. And who was elected Treasurer?

A. Ella Mae Banton.

Q. Was she elected by the directors?

A. I really couldn't remember. I couldn't recall whether there was members there or not.

Q. And Mrs. Banton was one of the original directors?

A. Yes.

Q. And I have inquired about her already?

Q. Yes.

Q. Now the record shows that the Annual Meeting of the Stockholders or probably should be called the members, on June 26, 1958, that is this year, the meeting proceeded to nominate and elect the following officers and directors: As President, Mr. Bird; as Vice President, Mr. Kennedy; [fol. 115] as Secretary, Wilhemina Edmonds. Was Mrs. Edmonds related to you in any way?

A. No.

Q. Was she associated with you in business in any way before the organization of the Cooperative?

A. Well, she worked by the hour. I made a mistake on the other question. She did work by the hour.

Q. By the hour for you?

A. Yes.

Q. In what capacity?

A. Trimming.

Q. Trimming?

A. Yes.

Q. Was she associated with you in any other way in business previously?

A. No; no.

Q. Where does Mrs. Edmonds live?

A. Burnham.

Q. In Burnham, Maine?

A. Yes.

Q. How far is that from Troy?

A. Oh, from where she lives it would be about six miles perhaps.

Q. And is she one of the ladies who has been furnishing goods to the Cooperative?

[fol. 116] A. No.

Q. As Secretary, does Mrs. Edmonds receive any salary or compensation from the Cooperative?

A. She hasn't.

Q. Is she entitled to a salary or has any salary been voted to her?

A. No.

Q. Now continuing the record shows that at the Annual Meeting, Mrs. Banton was elected Treasurer and that is the same Mrs. Banton who was one of the directors, is that correct?

A. Yes, that's correct.

Q. As Treasurer, was Mrs. Banton entitled to receive any salary?

A. I think she keeps track of her hours that she works.

Q. And she is paid on an hourly basis for the hours?

A. Yes, that's right.

Q. And the record continuing shows that Francis W. Jacob was elected Clerk. Was Mr. Jacob associated with you in any way?

A. He is a Tax Counsel and does the bookkeeping for the Cooperative. He and Mrs. Overlock do the bookkeeping.

Q. Mr. Jacob isn't related to you in any way?

A. No, no.

Q. And he is a Tax Accountant, you say.

[fol. 117] A. Yes, a Tax Counsel and they do the bookkeeping.

Q. Where is his place of business?

A. South China.

Q. And had he been associated with you in any way before the organization of the Cooperative?

A. No.

Q. Is Mr. Jacob here in court today?

A. Yes.

The Court: Does the Court understand he will be a witness for the defense, Mr. Bird?

Mr. Bird: He may be, yes. I am not sure at this point.

By the Court:

Q. Now the records continuing show that at the Annual Meeting in June 26, 1958, Wilhelmina Edmonds was elected director. She was previously a director?

A. Yes.

Q. Mrs. Banton who was previously a director?

A. Yes.

Q. Mrs. Miller, who was previously a director?

A. No, she was new.

Q. But Mrs. Miller is the lady concerning whom I have previously inquired?

A. Yes.

Q. Mrs. Leavitt, who was previously a director?

A. Yes.

[fol. 118] Q. And Mrs. Ireland, who was a director concerning whom I have previously inquired?

A. Yes.

The Court: The record also shows that you were continued as Manager on approval of the meeting by acclamation, is that correct?

The Witness: Yes.

By the Court:

Q. Are the officers and directors as elected at this most recent Annual Meeting in June of '58 still the officers and directors of the Cooperative?

A. Yes.

Q. There have been no changes?

A. No.

The Court: Perhaps after our midmorning recess, if counsel for the plaintiff wishes to inquire further along the lines—or in view of the Court's questioning—he will be accorded that privilege; otherwise, the cross-examination may proceed.

The Court then will be in recess until 11:45 by the courtroom clock.

(Recess: 11:30 to 11:45 a.m.)

EVELEN WHITAKER resumed the stand.

By the Court:

Q. Mrs. Whitaker, there is one other point which the Court would like to clarify in your testimony. Going [fol. 119] back to the time when you were in business yourself, prior to the organization of the Cooperative, will you explain to the Court how the ladies were paid to furnish goods to you?

A. I paid them by check.

Q. Assuming that a lady sent in 12 booties, how much was she paid and when?

A. Well, sometimes I was able to pay her at once and sometimes I had to wait a week or 10 days.

Q. When she sent those booties in, did you have an understanding with her as to the amount she would be paid?

A. Yes.

Q. For 12 booties, what would that be approximately?

A. Well, \$5.00, we will say, a dozen.

Q. At the time she sent the goods in to you, she would know that you were going to pay her \$5.00, is that correct?

A. Yes.

Q. What would determine whether you paid her immediately or waited?

A. Well, I guess getting sufficient money in to pay.

Q. If you had the money on hand, you would send her a check, right then, is that correct?

A. Yes, that's right.

Q. And that check would be for \$5.00?

[fol. 120] A. Well, whatever she sent in.

Q. Or if it were 12 booties, on the example we have been using, it would be \$5.00?

A. That's right.

Q. If you did not have the money on hand, you would wait until you had enough money to pay her?

A. Yes.

Q. But you would not necessarily wait until those particular 12 booties had been sold, is that correct?

A. No.

Q. Now, as the Cooperative has been working, the Court wants to be certain that it understands the arrangement. If this same lady sent in 12 booties to the Cooperative,

would there be any definite understanding with her at the time she sent them in as to the amount she would be paid?

A. Yes, I think she knows the amount she is going to be paid a dozen.

Q. For a dozen?

A. Yes.

Q. That might be \$5.00?

A. Yes, it could be.

Q. Now, how would she know the amount?

A. It is on the slip that we make out.

Q. When she sends the booties in, you make out a slip and give her a slip?

[fol. 121] A. Well, I don't always give her a slip. We keep the white slip until it is paid up.

Q. Now, what white slip are you referring to?

A. Well, we have a duplicate slip. One is white and one is yellow, and we send the yellow slip—the white slip when they are paid up for their goods.

Q. The white slip to whom?

A. The member.

Q. The member who sent the goods in?

A. Yes.

Q. And the yellow slip you keep for your records?

A. Yes.

Q. Who makes out the slip? Do you make it out?

A. Yes.

Q. And what do you put on the slip? What entry do you make on it?

A. The name and address and the date and the number of the things they are making and how many.

Q. And do you put a price on there at that time?

A. Yes.

Q. And it might be \$5.00 if it were a dozen booties?

A. Yes.

Q. And is it your understanding that at that time the Cooperative owes this lady \$5.00?

A. Well, I don't know as I could state that.

[fol. 122] Q. Well, this is a nonprofit organization and there might be more for the women afterward?

A. I would say they would be advanced the \$5.00, advanced the \$5.00.

Q. In other words, at that time the lady would know that she would be entitled to at least \$5.00?

A. Yes.

Q. But it is your understanding that she might also be entitled to something more in the event there were more money available?

A. Yes, that's right.

Q. Now, does the Court understand correctly that the Cooperative was hopeful and the directors actually voted that this lady, as other ladies, was to be paid for those booties before the 20th day of the month if the funds were available, is that correct?

A. Yes, that's right.

Q. But as a practical matter, funds were not or have not been available?

A. That's right.

Q. And the Cooperative's practice has been to pay these ladies on account as they have the money in the Treasury?

A. That's right.

Q. And this particular lady would be paid on account [fol. 123] until she had been paid \$5.00, is that correct?

A. Yes.

Q. And when she had been paid \$5.00, how would it be determined that if she was to be paid anything more than \$5.00?

A. Well, I don't know as you could determine that until the end of the year.

Q. It wouldn't depend on the price at which the 12 booties which she sent in were sold?

A. Now, do I get that right, your Honor?

Q. Well, assume that these 12 booties that this lady sent in were particularly well knitted for some reason or other and they were sold for, let's say, \$12.00, those particular booties, would there have been any record kept to indicate that those booties were the booties which this lady sent in?

A. No. Well, I would note the booties that they sent in, yes, but they all go for the same price, one styling is for the same price.

Q. They all go for the same price, and as a practical matter, those booties would be put in your inventory or stock and the stock would be sold out?

A. Yes.

Q. And you would not attempt to determine the price which was to—which was obtained from any particular

[fol. 124] dozen booties which might have been sent in, is that correct?

A. Yes, that would be correct, I think. I guess I don't understand.

Q. Well, let me say this. This lady would not receive more for her booties than some other lady would receive?

A. That's right.

Q. Even though her particular booties might have been sold for more?

A. That's right, yes.

The Court: Counsel may inquire.

By Mr. Thistle:

Q. Have any additional or extra payments been made to the workers?

A. Not to my knowledge.

Q. At the meeting in July—June rather—Margaret Lutz and Matilda Ireland were voted as replacements as directors, is that correct?

A. Yes.

Q. And have they been functioning as directors since that time?

A. No, they didn't want to be directors.

Q. Who were the directors that have accepted that—

A. Matilda Ireland; Matilda Ireland.

Q. Yes?

[fol. 125] A. And Ola Miller.

Q. Those are the two replacements?

A. Yes.

Q. And have they been functioning as directors?

A. Yes.

Q. Since June?

A. Yes.

Mr. Thistle: Thank you.

The Court: Does that complete the direct examination, Mr. Thistle?

Mr. Thistle: Yes, your Honor.

The Court: Cross-examination?

Cross-examination.

By Mr. Bird:

Q. Mrs. Whitaker, I am going to direct your attention in the first few questions I ask you to questions concerning the business that you operated before the Cooperative started, and when I start to ask you questions relative to the Cooperative, I will inform you so.

Mrs. Whitaker, in the operation of your business between 1952 and 1957, you kept your own books, did you not?

A. I did.

Q. You had your own checking account?

[fol. 126] A. I did.

Q. You wrote out your own checks?

A. Yes.

Q. You bought your own materials?

A. I don't get that question.

Q. Well, you bought the infants' garments yourself?

A. Yes.

Q. And you obligated yourself to pay for those garments when you bought them?

A. Yes.

Q. And you traveled on the road selling them yourself?

A. Yes.

Q. And you borrowed money at different times in your own name to keep the business going?

A. Yes.

Q. Now, in direct examination, a list of the names of 163 women from whom you admitted buying articles was introduced into evidence. Isn't it true that in the four or in the period from 1954 until 1957 you may have bought from some of these women only once?

A. Yes.

Mr. Thistle: Your Honor, the defendant is on the stand and is Mr. Bird's own witness. I don't know—

Mr. Bird: She is not my witness.

Mr. Thistle: I don't wish to prolong the case on ob-
[fol. 127] jections.

The Court: Your objection is to the leading questions, Mr. Thistle?

Mr. Thistle: He has asked about a dozen questions, the

answers to which were yes, directly leading—putting words in the mouth of the witness to testify herself.

Mr. Bird: This is the Government's witness.

The Court: As the Court construes Rule 43(b), the adverse party having been called by the plaintiff, she may be cross-examined by Mr. Bird upon the subject matter of her examination in chief.

The objection is overruled.

Mr. Bird: Would you read the answer to that last question, please?

(The last question and answer were read back by the reporter.)

By Mr. Bird:

Q. In reference to this same list of women, at any one time during that period from 1954 until 1957, how would you determine how many women you were buying for at any specific time?

A. I couldn't. I could by counting them up on my books.

Q. If the Court wished to know how many women you had bought from during January of 1955, he would have [fol. 128] to refer to your records?

A. Yes.

Q. Now, Mrs. Whitaker, I am going to ask you a few questions concerning the possibility of differences existing in the way you handled your business and the way the Cooperative handles its business.

Now, in the old days when you owned the business, on what did it depend whether or not you made any money out of the business?

A. Well, it was the sales.

Q. Did it depend upon whether or not you made a profit?

A. Yes, if you could sell your work, you could make a profit.

Q. In the operation of the Cooperative, does it affect the amount of your salary now whether or not the Cooperative makes a profit?

A. Well, it doesn't affect my salary.

Q. It affects the amount of money you get?

A. Yes, that's right.

Q. Under the Cooperative, who determines how much money you are paid?

A. The directors.

Q. In your own business, who paid for the women who worked for you in your home?

A. I did.

[fol. 129] Q. Who pays for it now?

A. The Cooperative.

Q. Who writes the checks?

A. Ella Mae Banton.

Q. She is the Treasurer?

A. Yes.

Q. In the way the Cooperative operates now, if they don't get paid, do you owe them anything?

A. No.

Q. In your own business, did you used to prepare payroll tax returns on these people who did trimming and shipping?

A. Yes.

Q. And you paid the taxes out of your own pocket?

A. Yes.

Q. Do you do these things now?

A. No.

Q. Who does them now?

A. The Cooperative.

Q. And who actually makes out these papers for the Cooperative?

A. Francis Jacob.

Q. And who writes the checks to pay the tax?

A. Mrs. Banton.

Q. And that check is drawn on whose account?

A. The Cooperative's account.

[fol. 130] Q. And that account is located where?

A. Unity Branch, Federal Trust.

Q. You speak of Mr. Jacobs, who is he?

A. He is a Tax counsel and bookkeeper.

Q. Who employed him?

A. The Cooperative.

Q. Did Mr. Jacob used to do this type of work for you?

A. No.

Q. When did you first hear about him?

A. I don't think I did. I never knew Mr. Jacobs until he came—

Q. Until he came to the Cooperative?

A. Yes.

Q. Now, you previously said in the old days you used to keep your own accounts and records of your business?

A. Yes.

Q. And you don't do this now?

A. No.

Q. In your capacity as General Manager of the Cooperative, you do keep certain invoice records and shipping records?

A. Yes.

Q. Do you have anything to do with the Cooperative's account book?

A. (No response.)

The Court: The answer?

[fol. 131] The Witness: I didn't get that, the account books; you mean the members?

By Mr. Bird:

Q. Yes?

A. The members account?

Q. Well, the entire accounting procedure of the Cooperative?

A. I just don't quite understand.

Q. Who keeps the account books?

A. Oh, Mr. Jacobs.

Q. Does he make up statements to give to the directors?

A. Yes.

Q. Who is Mrs. Overlock?

A. She is the Secretary.

Q. Whose Secretary?

A. Mr. Jacob's.

Q. Who pays Mrs. Overlock?

A. Mr. Jacobs?

Q. Who pays Mr. Jacobs?

A. The Cooperative.

Q. Is the check drawn on the Cooperative's account signed by Mrs. Banton?

A. Yes.

Q. Have you ever paid Mr. Jacobs for any work he has done on the Cooperative books?

A. No, I have not.

[fol. 132] Q. Did you have any say in the matter concerning the employment of Mr. Jacobs?

A. No.

Q. In the old days when you operated your own business, did you decide when it was proper—when was the proper time to send checks to the people from whom you bought things?

A. Yes.

Q. Now who decides now?

A. The directors.

Q. Well, calling your attention to a vote of the members at the June 26th meeting concerning the time of payment to the members, do you recall a vote that was taken at that meeting?

A. I do.

Mr. Thistle: Your Honor, I object. Before any vote could be offered and accepted by the Court it will have to be shown it was a legally called and held meeting.

The Court: To which meeting is the reference made?

Mr. Thistle: June 26th.

The Court: Of '58 or—

Mr. Bird: '58.

Mr. Thistle: It was the meeting in which 37 were present and the membership was 195. A quorum was [fol. 133] not present, so, therefore, any acts they do are not binding.

The Court: Mr. Bird?

Mr. Bird: May it please the Court. I merely am asking information of this particular witness as to her own knowledge of certain transactions. The minutes are in evidence by agreement of counsel, and I merely want to attempt to enable the witness to refresh her memory as to certain events that have transpired. I don't see how counsel for the plaintiff can object at this time to things that are already in evidence.

The Court: Well, this being a—

Mr. Bird: I do not—I agree that counsel merely stipulated that they went in as records only and not for the truth of the contents.

Mr. Thistle: Your Honor, actions taken at an illegally

held meeting have no evidentiary value, and therefore shouldn't be admitted in evidence.

The Court: Well, this being a matter which is being tried to the Court without a jury, the Court will overrule the objection and admit the answer to the question de bene. The Court can determine subsequently as to whether it is material or relevant in any way to these proceedings.

Mr. Bird: Would you read the question back, please.

[fol. 134] (The last question and answer were read back by the reporter.)

By Mr. Bird:

Q. Can you state what that motion was?

A. Well, the members voted to be paid every two months.

Q. They voted to be paid every two months?

A. Yes.

Q. Do you of your knowledge know whether or not that vote has been followed by the Board of Directors?

A. I think it has.

Q. Did you attend this meeting in June?

A. Yes.

Q. You say that the members voted that checks should be sent out every two months. Was there anything else that the stockholders decided?

A. I don't know as I could recall anything.

Q. Would the Minutes of that meeting refresh your memory?

A. It could.

Q. I will now show you the Minutes of the Annual Meeting of Stockholders held June 26, 1958, at the Pilot's Grill, Bangor, and ask you to read this portion.

A. (Witness reads to herself the designated portion.)

Q. Now that you have read the portion of the Minutes, is your memory refreshed about the action of the [fol. 135] membership?

A. Yes.

Q. Can you now tell me whether or not any other decisions were made by the membership at that meeting?

A. Yes, they were.

Q. Would you state what those decisions were?

A. I think I would have to read them over again. I'm sorry.

Q. Was one of the decisions made by the members a recommendation that there be annual membership dues of \$3.00?

A. Yes.

Q. And did the members vote to table a motion that a cash reserve be built up and maintained by withholding some portion of the amount due them?

A. Yes.

Q. And did they vote to amend the By-laws?

A. Yes.

Q. Did they vote to amend the By-laws so that the last sentence of Article 13, Section 3 of the By-laws be amended by striking out that last sentence?

A. Yes.

Q. And did they also vote to amend Article 7, Section 5, so that 25 members would constitute a quorum?

A. Yes.

[fol. 136] Mr. Thistle: Your Honor, I again object for the reason that not only would a meeting have to be held but the call of the meeting would have to be shown because of the—

The Court: Well, Mr. Thistle, without interrupting, the Court understands your position. The Court understands this witness is testifying as to actions which were taken by those present at what purported to be an annual meeting of the members on June 26, 1958; that there were 37 members present. The Court has noted the By-laws' provision that 51 per cent of the entire membership should be present to constitute a quorum. The Court would suggest that the meeting might not be a legal meeting and the actions not effective, but the matters which transpired on that occasion could be material to the issue with which the Court is here concerned. The Court is accepting this testimony with that understanding.

By Mr. Bird:

Q. Now, Mrs. Whitaker, calling your attention to the meeting held by the incorporators on July 9, 1957, at the Jefferson Hotel in Waterville, Maine, you stated that you were present at this meeting?

A. Yes.

Q. The By-laws of the—the proposed By-laws were read to the opening meeting?

[fol. 137] A. Yes.

Q. And each paragraph of the By-laws was voted upon after each one was read?

A. Yes.

Q. Do you recall how the name of the Cooperative was selected?

A. By vote of the members.

Q. Was this the only name proposed?

A. No.

Q. What other names were proposed?

A. I couldn't tell you that.

Q. I show you the Minutes of the first meeting of members and ask you to read this paragraph.

A. (Witness reads to herself the designated portion.)

Q. What names were proposed for the Cooperative?

A. I didn't get that first one.

Q. Was it Maine Homeworkers Cooperative, Inc.?

A. Yes, and United Homeworkers Cooperative.

Q. And the name selected by the majority of the associates was Whitaker House Cooperative, Inc.?

A. Yes.

Q. And this name was selected contrary to the advice of Counsel, Philip S. Bird?

A. Yes.

Q. Do you know why the name Whitaker House Cooperative was selected?

[fol. 138] A. I don't think I would know.

Q. Didn't some of the women tell you that they felt the name Whitaker House had some trade value?

A. Yes, I remember that.

Q. A set of proposed purposes of the Cooperative was read to the people present, was it not?

A. Yes.

Q. Do you recall whether or not any changes were made in those purposes?

A. I couldn't recall offhand.

Q. I now show the witness the Minutes of the first meeting of members—

A. Yes.

Q. —and does this refresh your memory as to any changes?

A. Yes.

Q. What changes were made, if any?

A. They voted to make any articles that they wished to make.

Q. And the proposed purpose was to limit them to products for babies, infants and children?

A. That's right.

Q. Do you recall any changes made in the proposed By-laws as they were read article by article?

A. No. At that first meeting?

Q. Yes?

[fol. 139] A. No, I don't recall.

Q. You do not keep the records of the meetings, do you?

A. No.

Q. You have attended all of the directors' meetings?

A. Yes.

Q. You are not always present during the entire meeting, are you?

A. No.

Q. You present a report of the business operations of the Cooperative of the preceding month?

A. I do.

Q. And then go about your work?

A. That's right.

Q. So you would have no particular way of knowing the actual contents of the records of the meeting?

A. No, I would not.

Q. Have you ever read through all of the Minutes?

A. No.

The Court: Does the Court understand these meetings are held monthly, once a month?

The Witness: I would say every month, yes.

By Mr. Bird:

Q. We did miss two months, I believe, did we not?

A. I don't recall.

Q. December of '57 was one month we missed. Was there [fol. 140] a special meeting of the membership some time in October?

A. Yes.

Q. Where was this held?

A. At the Grange Hall in Troy.

Q. The Grange Hall in Troy?

A. Yes, in October of '57.

Q. Do you recall what transpired at that meeting?

A. I don't know as I could.

Q. Can you tell us anything that happened at that meeting, to the best of your recollection?

A. The meeting was called, I think, to talk over the case that the Government had against the Cooperative.

Q. And were financial reports read to the members present at that meeting?

A. Yes, they were.

Q. At these meetings of the Board of Directors, do you tell the directors how they should run the business?

A. No, I do not.

Q. Has the Cooperative operated at a profit or a loss?

A. I know they have inventory on hand, but if that isn't sold, I don't know how you would—I would think Mr. Jacobs would answer that.

[fol. 141] By the Court:

Q. Mrs. Whitaker, at this October, 1957, meeting which was held in Troy, did you resign as Treasurer, as the record would indicate?

A. I think so.

Q. It was about that time?

A. Yes, I think so.

Q. And Mrs. Banton was elected to fill your place?

A. That's right.

Q. Why did you resign as Treasurer?

A. I had so much work to do that I didn't have time to take care of that job.

By Mr. Bird:

Q. Now, Mrs. Whitaker, when the Cooperative first started and the Board of Directors had their first meeting, there was a great deal of discussion as to how the entire operating procedures of the Cooperative would be set up, were there not?

A. Yes.

Q. And there was a lot of discussion as to how prices would be determined for sale to the retail stores?

A. Yes.

Q. And a great deal of discussion as to what would be a reasonable method of paying the receipts from the stores to the members?

[fol. 142] A. Yes.

Q. And the discussion centered around an estimate that the prices charged to the retail stores would be taken at, let's say, 100 per cent and from that price, 20 per cent would be deducted for the sales force?

A. Yes.

Q. And that approximately 20 per cent would be deducted for overhead expenses?

A. That's right.

Q. And that the remainder would go to the members?

A. That's right.

Q. And that as a result of these computations, a schedule of prices or advance allowances was made up?

A. Yes.

Q. Which the Board of Directors felt would be reasonable to advance to the members as the business went along?

A. Yes.

Q. It often happened that payment of these advance allowances to the members left the Cooperative very short of funds?

A. Yes.

Q. And the directors discussed the problem of controlling the inventory?

A. Yes.

[fol. 143] Q. The problem of controlling the inventory was one of the most difficult things the Cooperative had to encounter, was it not?

A. That's right.

Q. The people kept sending in the things even though the Cooperative was unable to sell them?

A. That's right.

Q. And a big backlog of inventory was built up?

A. That's right.

The Court: If this is a convenient time, Mr. Bird, it is 12:30 and perhaps some of us would like some lunch today.

The Court has certain criminal matters to dispose of at

1:30. We will therefore recess this case until 2 o'clock and proceed with this hearing at 2 o'clock if counsel are available and the Court might possibly be able to get at it a little sooner.

The Court then will be in recess until 2 o'clock this afternoon.

(Recess: 12:30 p.m. to 2:00 p.m.)

EVELYN WHITAKER resumed the stand.

Cross-examination continued.

By Mr. Bird:

Q. Mrs. Whitaker, when the Cooperative was being formed or just prior to the time it was actually formed, was there any agreement between you and any of the people who became members of the Cooperative that they should hire you as General Manager of the Cooperative?

A. At the time it was formed?

Q. No, before it was formed?

A. No.

Q. Then, when the Cooperative was actually formed, you had no way of knowing whether you were going to be hired or not?

A. No.

Q. Now, yesterday, on direct examination in response to a question directed to you by Plaintiff's counsel, you said that the business of the Cooperative is not the same business as you yourself operated?

A. No, it isn't.

Q. The Cooperative carries many more lines of items than you ever carried?

A. That's right.

Q. And their volume of business is greatly in excess of what you used to do yourself?

A. Yes.

Q. The Cooperative not only sells baby things but they also sell toys made out of wool?

A. That's right.

Q. They sell women's stoles?

A. Yes.

[fol. 145] Q. And women's capes?

A. Yes.

Q. Either crocheted or knitted?

A. Yes.

The Court: Did you say toys, Brother Bird?

Mr. Bird: Toys.

The Court: Woolen toys?

Mr. Bird: Yes, your Honor, t-o-y-s.

By Mr. Bird:

Q. Would you describe what these toys consist of?

A. Well, they are made of woolens and in the likeness of clowns and chickens and rabbits.

Q. Did you ever sell these yourself?

A. No, I never did.

Q. Did you ever sell stoles or capes yourself?

A. No.

Q. When you were elected Treasurer, you were required to be bonded?

A. Yes.

Q. You were bonded in the amount of \$2,000?

A. Yes.

Q. Now, yesterday on direct examination Brother Thistle asked you if you had ever received any direct instructions from individual members and you said that you didn't think so. Isn't it true that since the Cooperative [fol. 146] has been organized several of the members have asked you for their checks?

A. Yes.

Q. And what did you do with these requests?

A. I sent them to Mrs. Banton.

Q. You sent them to Mrs. Banton?

A. Yes.

Q. Did you occasionally refer these matters to the Board of Directors?

A. Yes.

Q. Now, the price that you charged the Cooperative for the inventory that belonged to you was the price that you normally sold the things for yourself?

A. That's right.

Q. The Cooperative then turned around and sold it for a much higher price, did they not?

A. That's right.

Q. As, for example, you used to sell one particular type of sacque set for \$36.00?

A. That's right.

Q. You charged the Cooperative \$36.00?

A. That's right.

Q. For that same set when it was in that inventory?

A. Yes.

Q. And when you turned over that inventory, this inventory was all finished goods?

[fol. 147] A. That's right.

Q. So you had paid for having the trimming done on this inventory?

A. That's right.

Q. You charged \$36.00 for that dozen and the Cooperative turned around and sold it for \$69.00 a dozen?

A. No, \$54.00.

Q. \$54.00?

A. Yes.

Q. And of that \$54.00, 20 per cent went to the sales force?

A. Yes.

Q. So of the \$54.00, 10.80 went to the sales force?

A. That's right.

Q. That left \$43.20 for the Cooperative?

A. That's right.

Q. And you were charging \$36.00 for that?

A. That's right.

Q. They made an \$8.20 profit on that?

A. That's right.

Q. Goods that were already finished; goods that they did not have to pay for having trimmed?

A. That's right.

Q. Now, before I forget it, there were a few things that the Judge brought out in his questioning. He [fol. 148] asked you whether or not Mrs. Leavitt was ever employed by you?

A. Yes.

Q. And you said that she had not been employed by you?

A. I'm sorry, I forgot.

Q. Did you realize what he was saying?

A. I don't think so.

Q. She had been at different times employed by you?

A. Yes.

Q. She lives about 13 miles from where you live?

A. Yes.

Q. And you would, when you got rushed in your own personal business, you would ask her to come down and help you trim some things?

A. That's right.

Q. And you would pay her a dollar an hour for that?

A. That's right.

By The Court:

Q. Mrs. Whitaker, what was the volume of business done by you in the last year in which you conducted the business individually yourself?

A. I don't think I could tell you offhand.

Q. What was the amount of business done by the Cooperative in its first year?

A. I would have to refer you to Mr. Jacobs.

[fol. 149] Q. You have testified that the amount of business done by the Cooperative was substantially greater than that done by you?

A. Yes, it was.

Q. Can you make available to the Court figures as to the amount of business that you did in the last year in which you operated?

A. I could.

Q. And the amount of business which the Cooperative did in its first year?

A. Yes.

The Court: Would counsel see that is secured?

Mr. Bird: Yes, after we finish examining her, we will get that.

By Mr. Bird:

Q. Is there anybody here who could get those records for you?

A. I would have—it is down to the Murray Motor Mart in the trunk of the car. I wouldn't have the exact amount. It is in a book at home what I sold.

The Court: Well, counsel knows what the Court would like to have and counsel will obtain the best possible data along that line. That need not be done immediately.

[fol. 150] By Mr. Bird:

Q. The goods that the Cooperative sells are sent directly to the stores?

A. That's right.

Q. Who, in turn, sell them to the public?

A. That's right.

Q. They are not distributed through any middlemen or anything like that?

A. No.

Q. Any brokers?

A. No.

Q. And the Cooperative receives checks directly from the stores?

A. That's right.

Q. And the Cooperative has about 300 stores on its accounts?

A. I believe so.

Q. These checks come to the business office of the Cooperative at your home in Troy?

A. That's right.

Q. Do you deposit the checks?

A. I do.

Q. What do you do with the deposit slips?

A. I put them in the check book. I send them to Mrs. Banton.

[fol. 151] Q. You send them to Mrs. Banton?

A. Yes, I do.

Q. And they are entered by her in the checkbook?

A. That's right.

Q. I previously asked you if some of the members make requests of you to send them a check and you said you referred this matter to the Board of Directors or the Treasurer?

A. That's right.

Q. Do you tell the Treasurer to send her a check?

A. No.

Q. Do you tell the Board of Directors to send them a check?

A. No.

Q. It has happened during the course of the operation of the Cooperative that many of the members have not been paid for as long as six months?

A. Yes.

Q. What was the reason for that?

A. I would say the inventory that we had on hand.

Q. I beg your pardon?

A. No sales and the inventory on hand.

Q. There is a truck going by. I couldn't hear that?

A. Not enough sales to take care of the inventory.

Q. The Cooperative had difficulty in keeping the members from sending things in?

[fol. 152] A. Yes.

The Court: If counsel would defer for a moment, there is a matter which the Court will have to attend to. If this witness could step down and we will recess this hearing for 10 or 15 minutes while we dispose of this other matter.

(A recess was taken at 2:40 p.m. and concluded at 2:50 p.m.)

The Court: The Court apologizes to counsel for the delay. There were other matters that have to be disposed of.

Mr. Bird: Counsel appreciate the brief respite.

EVELYN WHITAKER resumed the stand.

Cross-examination continued.

By Mr. Bird:

Q. Mrs. Whitaker, has the Cooperative ever published a list of its retail prices?

A. Yes, they have.

Mr. Bird: Would you mark this, please.

(Printed document, "Entitled Whitaker House Cooperative, Inc., Hand Made Originals, etc.", being a list of articles and price per dozen, was marked for identification as Defendant's Exhibit Number 3.)

[fol. 153] By Mr. Bird:

Q. I show you this and ask you if you can identify it?

A. Yes.

The Court: Has that been marked as Defendant's Exhibit Number 3?

Mr. Bird: Yes.

The Witness: Yes, I can.

Q. Would you tell the Court what it is?

A. It is a price list of the different articles that is sold by the Cooperative.

Mr. Thistle: Is there an extra copy?

(Discussion off the record.)

By Mr. Bird:

Q. Can you tell us the approximate date when this list was made up?

A. I couldn't.

Q. Well, I don't mean a specific date, just say the month?

A. I know it was in '57 sometime, the first of the organization.

Q. Somewhere near when they were first organized?

A. Yes.

Mr. Bird: I offer this in evidence.

The Court: Defendant's Exhibit Number 3 has been [fol. 154] offered in evidence. Is there objection?

Mr. Thistle: No objection, your Honor.

The Court: It may be admitted.

By Mr. Bird:

Q. Mrs. Whitaker, directing your attention to Defendant's Exhibit 3, are these the sets that the Cooperative began business selling?

A. Yes.

Q. And have there been several changes in this list since then?

— A. Several changes in the styles.

Q. Several changes in the styles?

A. Yes.

Q. Have the prices remained the same?

A. Yes.

Q. And the Cooperative is now selling similar articles at the same prices?

A. Yes.

Q. And these are the prices that the stores pay for these articles?

A. That's right.

Q. Have any of the members of the Cooperative received a copy of that price list?

A. Some of them.

Q. And is that price list available at the Cooperative office?

^a[fol. 155] A. That's right, yes.

Q. To any of the members that request a copy?

A. That's right.

Q. Since the Cooperative was organized, has there been any insurance on the inventory or the other stock of the Cooperative?

A. There has.

Q. And who pays for that insurance?

A. The Cooperative.

Q. Has the Cooperative had billheads printed?

A. Yes.

Q. And invoices printed?

A. Yes.

Q. And stationery printed?

A. Yes.

Q. Now calling your attention to the amounts received by the members for these items, do they receive more for their items now under the Cooperative system of organization than they received from you?

A. Yes.

Q. Can you give a specific example of such a change to the Court?

A. There were sets I sold for \$36.00 that sold for \$54.00 now a dozen.

Q. Yes, but I mean the amounts that the members received from such a set?

[fol. 156] A. A dollar and sometimes \$2.00 more.

Q. They receive a dollar and sometimes \$2.00 more?

A. Yes.

Q. Referring to the business that you formerly operated,

most of your accounts were located either in Maine, Massachusetts, Vermont or New Hampshire?

A. That's right.

Q. And at the present time the Cooperative—strike that. Most of the Cooperative's customers are in areas that you never did send materials to?

A. That's right.

Q. Isn't it true that because of the increase in prices that the Cooperative charged, stores that formerly did business with you refused to do business with the Cooperative?

A. That's right.

The Court: Is that most of the stores that did business with you, Mrs. Whitaker?

The Witness: That don't buy now?

The Court: Yes?

The Witness: Most of them, yes.

By the Court:

Q. And most of the Cooperative's present accounts or customers are located in states other than Maine, Massachusetts, Vermont and New Hampshire?

A. Well, all over.

[fol. 157] Q. All over?

A. Yes, new accounts though.

Q. New accounts?

A. New accounts.

Q. By "all over" you mean outside of New England?

A. Yes.

Q. How many—approximately how many customers do you have outside of Maine, Massachusetts, New Hampshire and—

A. I couldn't tell you.

Q. Would it be fifty?

A. Oh, yes.

Q. One hundred?

A. Yes, all of that.

By Mr. Bird:

Q. To the best of your recollection, would it be fair to say that in your best year in business for yourself, the total amount that you sold and received for the sale of these articles was approximately \$19,000?

A. Yes.

Q. And is it also true that in the first year or the first thirteen and one-half months business the Cooperative sold approximately \$45,000 worth of merchandise?

A. That's right.

[fol. 158] Q. Calling your attention to a question directed to you by Mr. Thistle yesterday concerning the activities of the President in the affairs of the Cooperative. He asked you a question: Has he participated in discussions of how the business could be conducted? And I believe you stated yes, that he had participated. I want to ask you a couple of questions about that.

To your knowledge has the President ever made any decision of policy that the Board of Directors followed?

A. I don't think so.

Q. And isn't it a matter of fact that at the monthly meetings the President merely presented problems that it was necessary for the Board of Directors to decide?

A. That's right.

Mr. Bird: May it please the Court. Counsel have arrived at a stipulation on which I believe will save some time. It is stipulated between counsel for the defense and counsel for the plaintiff that the record contained in Defense Exhibit 2, the Minutes of the Board of Directors' Meetings, pertaining to votes of the Board of Directors is a true and accurate account of the actions taken by the Board of Directors.

The Court: That refers only to actions taken by the Directors?

Mr. Bird: Right.

[fol. 159] The Court: And not at meetings to members, is that correct?

Mr. Bird: It would include the actions of the members, too.

Mr. Thistle: Well, your Honor, I could consent to a stipulation that they went through the motions as reported but as to the validity of their action, I won't stipulate.

Mr. Bird: That is all right if he wants to state that he does not agree to the validity of the action, but does agree these things happened and the record as introduced—

The Court: The Court understands then that it is stipu-

lated between counsel that the actions—that the Minutes of the meetings of the Directors and members of the Cooperative as contained in Defendant's Exhibit Number 2 are a true and accurate record of the actions taken at those meetings, counsel reserving, of course, the right to question the validity or effectiveness of any such actions. Is that stipulation satisfactory to counsel?

Mr. Thistle: Yes, your Honor.

Mr. Bird: Yes, your Honor.

By Mr. Bird:

Q. Mrs. Whitaker, some time before the Cooperative was organized, you have testified as to a conversation you had [fol. 160] with Mr. Appleton Gould?

A. Right.

Q. And in response to a question directed to you by Mr. Thistle as to where the idea of the Cooperative originated, you stated it was from Mr. Gould?

A. That's right.

Q. Mr. Gould said that he would do everything he could to help the organization of the Cooperative?

A. He did.

Q. Do you recall where this conversation with Mr. Gould took place?

A. Well, there was two places, at my home and at your office.

Q. And approximately when did those conversations take place?

A. He picked me up one day, called me up from Bangor, and said he wanted me to go down to your office, and I went down with him to talk over some business with him.

Q. Can you recall approximately what month this was in?

A. I would say in June, the last of June.

The Court: Of 1957?

The Witness: Yes, or it might have been the first of July. We didn't put the date down.

Mr. Bird: It is stipulated between the defense and the [fol. 161] plaintiff that if an auditing of the Cooperative's books were made as of September 4, 1958, it would show accounts receivable as of that date in the amount of \$5,289.00 and that 58 per cent of that or the members' actual average

share as determined by the auditing of the books to the nearest round percentage would be \$3,068.00 and that the unpaid balances due members on merchandise sold and included within the accounts receivable equalled \$3,991.00.

The counsel for the plaintiff suggested that that be amended to show that 58 per cent would be the members' actual average compensation rather than share.

The Court: Is the stipulation, as amended, accepted by plaintiff's counsel?

Mr. Thistle: Yes, your Honor.

Mr. Bird: Yes, your Honor.

Mr. Thistle: Well, would your Honor read it? Have you written it down?

The Court: It would appear in the record as amended by Mr. Bird,

The Court will state its understanding that if an audit were made of the Cooperative's books as of September 4, 1958, it would show \$5,289.00 accounts receivable and that 58 per cent of that would be the members actual average compensation, that sum being \$3,068.00, and that the unpaid balances due the members on merchandise sold and included in the accounts receivable would be \$3,991.00, is that correct, Mr. Bird?

Mr. Bird: Yes, your Honor.

The Court: Mr. Thistle?

Mr. Thistle: Yes, your Honor.

The Court: That is accepted?

Mr. Bird: It is further stipulated between counsel for the defense and counsel for the plaintiff that initial payments up until—

The Court: Will counsel attempt to distinguish between what should be on the record and what should be off the record. These voices are disconcerting to the reporter.

Mr. Bird: May I restate that? It will probably be better.

It is stipulated that first payments to members since the start of the Cooperative amount to a total of \$3,272.00 and that subsequent payments have amounted to \$20,597.57.

Mr. Bird: No further questions.

The Court: Is that last stipulation accepted by counsel for the plaintiff?

Mr. Thistle: It is, your Honor.

[fol. 163] The Court: That completes the cross-examination of this witness?

Mr. Bird: Yes, your Honor.

The Court: Redirect examination?

Redirect examination.

Q. How long have you known Mr. Appleton Gould?

A. Why he has been investigating this for since the 40 cent wage an hour law went into effect.

Q. Will you agree that that is in excess of ten years?

A. How long has the 40 cent wage an hour been in effect?

Q. He says it is '40 or '41, will you agree that you have known Mr. Gould in excess of 15 years as an investigator for the Wage and Hour Law?

A. I don't remember whether he called at my home as far back as that. You might ask him. I can't recall.

Q. But you have known him for several years?

A. Yes.

Q. And you knew him as an investigator?

A. Yes.

Q. To your knowledge, he is not an attorney-at-law?

A. I wouldn't know.

Q. You have no knowledge that he has ever been or ever represented to be an attorney?

[fol. 164] A. No, I haven't.

Q. In other words, you are not informed on the subject as to whether or not he is a lawyer?

A. No, I wouldn't know.

Q. In June, 1957, did he go to your place of business at Troy for the purpose of making a wage an hour investigation?

A. He called on me.

Q. Yes, and he asked for your records?

A. I don't think so.

Q. Did he state the purpose of his call?

A. I don't recall.

Q. He came into your place of business?

A. That's right.

Q. Your home?

A. Yes.

Q. You don't recall any reason stated by him for his presence in your home?

A. I know he didn't ask for my records.

Q. Well, in consequence of a talk with him, did you go with him to Mr. Bird's office?

A. That's right.

Q. And Mr. Bird, who is trying in this case, is an attorney-at-law?

A. Yes.

Q. And he is your legal adviser?

[fol. 165] A. Yes, he was.

Q. And has been your legal adviser for some time?

A. Just since June.

Q. Of 1957?

A. Yes.

Q. And you went over and talked over with him the facts in regard to organizing a cooperative?

A. We both talked it over when Mr. Gould was there.

Q. You and Mr. Gould and Mr. Bird?

A. That's right.

Q. Talked over the subject matter of a cooperative?

A. That's right.

Mr. Thistle: May it be stipulated, your Honor, by agreement of counsel that Mr. Gould is not an attorney-at-law?

Mr. Bird: It is so stipulated, your Honor.

By Mr. Thistle:

Q. When you were in business for yourself, particularly the last year when you did \$19,000 worth of business, you made a profit?

A. I tied it up in inventory.

Q. Yes.

A. I suppose you would call—

Q.—you increased your inventory?

A. Yes.

Q. And, in other words, in any money you made, you put [fol. 166] in inventory?

A. That's right.

Q. Went into purchases you made?

A. Yes.

Q. And did you make a substantial increase in your inventory?

A. Yes.

Q. In other words, in doing \$19,000 worth of business,

the year before you organized the Cooperative, you made a substantial profit which you put into inventory?

A. That's right.

Q. In operating a Cooperative 13 and one-half months as General Manager, you did \$45,000 business and you made no profit, or the Cooperative made no profit, is that right?

A. I couldn't answer that question.

Q. Don't you know whether or not this Cooperative is running in the red?

A. Yes, I know that we have goods on hand that will be sold so that we will get it out of the red.

Q. At certain times were you unable to pay the members because of financial—lack of financial resources?

A. I would have to refer you to the directors.

Q. Don't you recall a meeting of the Board of Directors in which they provided for postponement of payment be- [fol. 167] cause of their financial condition?

A. Yes.

Q. That is correct, isn't it?

A. Yes.

Q. Now being strictly honest—

A. I am trying to.

Q. —Mrs. Whitaker, won't you agree that in doing \$45,000 worth of business, the Cooperative made no money?

A. Well, they haven't the money on hand, no.

Q. They made no net money?

A. No.

Q. And is Fannie Johnson of Unity from whom the ladies purchased yarn a member of the Cooperative?

A. Yes.

The Court: Does Mrs. Johnson furnish goods to the Cooperative herself?

The Witness: Yes.

The Court: That she knits herself?

The Witness: That's right.

By Mr. Thistle:

Q. Now, you recall from your testimony that Ella Mae Banton was elected Treasurer as a substitute for you when you resigned as of October 10, 1957?

A. Yes.

[fol. 168] Q. She was elected substitute by the Board of Directors?

A. Yes.

Q. I am showing you a copy of the By-laws. Will you point out with the assistance of counsel that part of the By-laws that authorizes the Board of Directors to fill a vacancy in the Treasurer's Office?

Mr. Bird: Objection.

The Court: Grounds?

Mr. Bird: The By-laws are in evidence and the witness has not been shown to be the compiler of the By-laws or a lawyer or interpreter of legal relationships.

The Court: The objection is sustained.

By Mr. Thistle:

Q. Pointing out in the By-laws, Article 8, Board of Directors, Section 4, Vacancies, doesn't it say: "In the event of any vacancy in the Board of Directors through death, resignation or other cause . . ." and so forth, isn't that the way it is written?

A. Yes.

Q. Is there any statement there as to a vacancy in the office of Treasurer?

Mr. Bird: Objection on the same grounds.

The Court: The Court does not understand, Mr. Thistle, the purpose of this questioning. The By-laws would seem [fol. 169] to speak for themselves.

Mr. Thistle: Well then it can be shortened by my making an offer of proof that there is no authorization in the By-laws of Whitaker House Cooperative, Inc., that authorizes the Board of Directors to fill a vacancy in the office of Treasurer occurring by reason of her resignation.

The Court: The offer would seem to relate to a question of interpretation of the By-laws which are presently in evidence, Mr. Thistle.

The Court has not had occasion to examine them but the Court would not feel it would be an appropriate subject for stipulation.

Mr. Bird may wish to concede for purposes of argument there is no such provision in the By-laws; he may not. The Court will inquire of Mr. Bird as to his position.

Mr. Bird: I believe I would want to review the laws of Internal Corporate Interpretation of By-laws to find out whether or not this is true.

Mr. Thistle: Well, your Honor, we will leave it. Plaintiff's counsel directs the attention of the Court to the By-laws and asks the Court to examine the By-laws to ascertain whether or not the Board of Directors have any authority to fill a vacancy by reason of resignation.

[fol. 170] The Court: The Court will be most happy to do so, Mr. Thistle. The Court will wish to know at some point how the determination of that question may be material to the issue in this case, but presumably counsel will enlighten the Court at some subsequent date.

Mr. Thistle: Your Honor, we have asked Mr. Bird and he has agreed that on October 26, 1957, the Cooperative had 172 members, is that correct?

Mr. Bird: That's correct, your Honor.

By Mr. Thistle:

Q. I call your attention, Mrs. Whitaker, to a meeting of the members which took place on October 26, 1957. Were you present at that meeting?

A. Yes.

Q. And was that a meeting where the members purported to fill a vacancy caused by your resignation as Treasurer by electing or by electing Ella Banton as Treasurer?

A. I wonder if I understand the question right?

Mr. Thistle: Will you read it, please.

(The pending question was read back by the reporter.)

The Witness: Was that a meeting of the members?

Mr. Thistle: Yes.

[fol. 171] The Witness: Yes.

Mr. Thistle: A special meeting of the members?

The Witness: Yes.

Mr. Thistle: Can you give me a copy of the notice that was sent out for that special meeting, Mr. Bird?

Mr. Bird: I don't believe I could produce it today. I would have to go through my secretary's records. I don't believe it is here today.

By Mr. Thistle:

Q. Refreshing your recollection from this report, by the Secretary of the Board of Directors, will you kindly tell us how many members were present at that meeting?

A. I don't think I could tell you offhand.

Q. Will you read this?

A. Yes, I will, forty-one.

Q. Forty-one. Would you say that is about correct?

A. I would think so.

Q. Will you agree that mathematically with 172 members that 51 per cent of 172 members is at least 87 members?

Mr. Bird: Fifty-one per cent of 172 is at least 87. That sounds correct. I will agree to that.

[fol. 172] By Mr. Thistle:

Q. Will you agree, Mrs. Whitaker, notwithstanding the provision in the By-laws as to the members of the meeting that in order to have a quorum, there must be 51 per cent of the members present?

A. Yes.

Q. Notwithstanding that at this particular meeting in October 26, 1957, there being 172 members in order to have a quorum, you had present—there must be present 87 members and you had present only—

The Court: Forty-one, the record shows.

Q. —forty-one members; you will agree with that statement?

A. Yes, I will.

Q. And notwithstanding the fact that at this members meeting only 41 present when a quorum at that time was 87, the consequence of this purported election of Ella Banton, she has purported to act as Treasurer of the Cooperative since October 26, 1957?

A. Yes.

Q. And she has dispensed the funds of the corporation and signed the checks since that time?

A. Yes.

Mr. Thistle: No further questions, your Honor.

[fols. 173-181] The Court: Is there recross examination?

Recross-examination.

By Mr. Bird:

Q. Mrs. Whitaker, the Cooperative has several expenses which you did not have when you operated the business yourself, does it not?

A. That's right.

Q. It has the President's salary; it has the cost of the accounting which you did not have?

A. That's right.

Q. It has the cost of printing that you did not have?

A. That's right.

Q. It has a cost of 20 per cent for a sales force that you did not have?

A. That's right.

Mr. Bird: No further questions, your Honor.

Mr. Thistle: No further questions.

The Court: Mr. Thistle?

Mr. Thistle: No further questions.

The Court: The witness may step down.

(Witness excused.)

Mr. Thistle: The plaintiff rests, your Honor.

[fols. 182-186] AUDREY LEAVITT, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bird:

[fol. 187] Q. At these directors meetings, has Mrs. Whitaker told the directors how to run the business?

A. Never, no.

Q. What has she done at these meetings, if anything?

A. She usually keeps about her work.

Q. Does she give a report of the business activities to the directors?

A. She might offer some information if they requested it.

Q. At these meetings of the Board of directors, has the President told the directors what to do?

A. No.

Q. What does the President do at these meetings?

A. He presides at the meetings and presents problems to be discussed by the directors and voted upon.

Q. And after discussion of the problems by the directors, what happens next, if anything?

A. They are discussed by the directors and voted upon.

Q. Do you recall any of the general membership attending these meetings of the Board of Directors?

A. Yes, yes, I do.

Q. Do they attend frequently or not very often?

A. There are always some of the members there outside [fol. 188] of the directors.

Q. Where do you make these infants' wear that you sent to the Cooperative?

A. In my own home.

Q. When do you make them?

A. Whenever I have time to devote to it.

Q. How do you determine what you will make?

A. Well, I have made the articles so long, so many years, that I have a selection.

Q. You have a selection?

A. I can select what I wish to do.

Q. You select what you wish to do and make it?

A. Yes, I am always glad to do the thing that is needed or necessary.

Q. When you start to make an article, do you know exactly how much money you will get for it?

A. Yes.

Mr. Thistle: I didn't quite hear that.

The Court: "Yes."

By Mr. Bird:

Q. Will you explain that?

A. Well, I know what I am paid by the dozen.

Q. Right.

A. And I also know that I will have to wait until the goods are sold before I get my full pay.

Mr. Thistle: I am sorry to interrupt. Could I ask that [fols. 189-190] answer be repeated?

The Court: Would the reporter read the question and answer back?

(The last question and answer were read back by the reporter.)

By Mr. Bird:

Q. Are the articles that you send in to the Cooperative ready to be sold when you submit them for sale?

A. No, they are not.

.

[fol. 191] Q. Do you personally know of any differences between the way Mrs. Whitaker operated her business and the way the women, as a Cooperative, operate their business?

A. Yes.

Q. What are some of these differences?

A. Well, in Mrs. Whitaker's business we sold directly to her and receive our pay by check. As a Cooperative, we submit our work and wait for the Cooperative to sell it for us.

Q. Did you have to wait long for your money when Mrs. Whitaker was operating the business?

A. We had to wait sometimes until she received her money.

Q. Did you ever wait as long as you have waited under the Cooperative?

[fol. 192] A. No, no.

Q. Does anyone make a profit on the sale of the items sold by the Cooperative?

A. No, the sales force.

Q. Beg your pardon?

A. The sales force, they get a percentage.

Q. They get a percentage?

A. Yes.

Q. Does anyone else make a profit on it, that you know of?

A. No, I don't think so.

Q. Where does the authority of the Board of Directors come from?

A. By the members.

Q. Where does the authority of the General Manager come from?

A. The Directors.

Q. What has the Cooperative done, if anything, for its members?

A. It is or has enabled them to keep on working in their own homes. I think that is the main thing it's done for them.

Q. How did you find out about the organization of the Cooperative?

A. Well, I heard it from several ways.

Q. Are you able to make about anything that the Co-[fols. 193-194] operative sells?

A. Yes.

The Court: In answer to the previous question, Mrs. Leavitt, you say you learned of the organization of the Cooperative in several ways. In what way did you learn of its organization?

The Witness: Well, at the time Mr. Gould advised Mrs. Whitaker to help to start a Cooperative, I heard it that time and then when they were going to organize.

The Court: Do you recall the individuals who first told you of this?

The Witness: Well, I think Mrs. Whitaker told me, if I remember.

[fol. 195] Cross-examination.

By Mr. Thistle:

Q. Mrs. Leavitt, you a good friend of Mrs. Whitaker's?

A. Yes, I consider myself so.

Q. You have been very friendly with her for years?

A. Yes, I have.

Q. And you think very highly of Mrs. Whitaker?

A. I do indeed.

Q. You consider her a very honorable person?

A. Yes, indeed.

Q. And have you at any time lived at her house or she at your house?

A. Yes, she has lived in my house when——

Q. At what time?

A. The time she was—well, I can't remember the date.

Q. What year?

[fol. 196] A. I don't remember that. It was probably 15 years ago.

Q. For how long a period of time did she live at your house?

A. Just through the winter months.

Q. And your acquaintanceship and friendship has continued ever since that time?

A. Yes, it has.

Q. Do you recall the names of the organizations for whom you did this type of work other than this Cooperative and Mrs. Whitaker?

A. Yes, I do.

Q. Will you give us the names and addresses?

A. A department store here in Bangor and individuals, perhaps a few individuals, and you mean years back, way back?

Q. Yes, any outside of the state organizations?

A. Oh, yes, Van Wagner and Sagger.

Q. Wagner?

A. Van Wagner and Sagger.

Q. And where are they located?

A. New York.

Q. And the other New York concern?

A. The Bluebird Company and the May Company.

The Court: How long ago was that, Mrs. Leavitt?

[fol. 197] The Witness: That was when I first started making these articles.

The Court: Sixty years ago, did you say?

The Witness: No, not 60, 50, please.

The Court: Didn't you testify that you had been doing this for 50 or 60 years?

The Witness: Fifty years.

The Court: This was 10 or 15 years ago?

The Witness: Oh, longer ago than that.

The Court: Twenty-five years ago?

The Witness: Oh, yes.

By Mr. Thistle:

Q. Now, when you made things for Mrs. Whitaker, you delivered or mailed the items in to her?

A. Yes, I did.

Q. And did you have an agreement as to what she would pay or did she just mail you whatever she thought was the proper price?

A. She always told me what I would receive. She always told me what I would receive for them by the dozen.

Q. Tell you a definite amount?

A. By the dozen, yes.

Q. And other than the matter what you received for your work, when you started sending in to the Cooperative you worked under substantially the same arrangement?

[fol. 198] A. No.

Q. You made the articles?

A. Yes, I made them.

Q. You had no particular order?

A. I had a choice of what I—

Q. You had a choice of several items?

A. Yes.

Q. You made whatever items you wished?

A. Yes.

Q. Whatever you choosed to make?

A. Yes.

Q. And you sent them in to the Cooperative?

A. That's right.

Q. And then eventually you received compensation or a check?

A. That's right.

Q. And was there any definite agreement as to price?

A. Yes.

Q. That is, you had a definite firm price?

A. Yes.

Q. For the items that you sent in?

A. Yes.

Q. And within a short time you would receive your money?

A. Yes.

[fol. 199] Q. And in the early days of the Cooperative, the payments were fairly regular?

A. Yes.

Q. And isn't it true that as the Cooperative continued to do business, the time between your delivery and receipt of your check enlarged?

A. Yes, but may I say something?

Q. I think you have answered yes.

A. Yes.

The Court: The witness may complete her answer if she wishes.

The Witness: I was willing to wait for my checks because I thought perhaps some of the members needed them more than I did.

By Mr. Thistle:

Q. That is, you were in no immediate need of funds so it was rather immaterial whether you got your check on-time?

A. Yes, that's right.

Q. But the time did increase as you went along month by month?

A. Yes.

Q. And your arrangement with the Cooperative, other than the manner of payment, was just about the same as the arrangement with Mrs. Whitaker when she was operating?

[fol. 200] A. Yes.

Q. Just continued along the same method?

A. Yes, we could get an advance payment in the Cooperative and then wait for the rest of it when the goods were sold.

Q. And you accepted whatever price the Cooperative put on the articles you sent in?

A. No.

Q. Did you ever dispute the price paid you?

A. Whatever the price was quoted to me, I expected to get.

Q. And with the Cooperative that was a definite price?

A. Yes.

Q. Now at different times when you worked for Mrs. Whitaker the payments were rather slow?

A. What do you mean worked for her?

Q. Yes, personally?

A. Making the articles or trimming, which did you mean?

Q. Well, any articles you made, isn't it a fact or didn't you testify that at certain times the payments were slow?

A. That's right.

Q. That was probably because she built up an inventory or maybe because there wasn't a ready sale for the articles? [fols. 201-215] A. Yes, that was right.

Q. Or it was an off season?

A. Yes.

Q. On this occasion, the payment would be a little slower?

A. Especially through the winter.

Q. And isn't that just about the same as the situation today with the Cooperative that when they built up an inventory or customers are hard to get or slow payment they are slow in paying; that your checks are somewhat slower in coming to you?

A. That's right.

[fol. 216] DORA FERNALD, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bird:

Q. Are you employed by Whitaker House Cooperative?

A. Yes.

[fol. 217] Q. And before the Cooperative was organized, did you use to work for Mrs. Whitaker?

A. Yes.

Q. Where?

A. At her house.

Q. How much were you paid per hour?

A. One dollar.

Q. And what are you paid per hour now?

A. One dollar.

Q. What work do you do?

A. Well, mostly trimming.

Q. And how many days a week on the average would you say that you worked?

A. Well, on the average, I should say three.

Q. Three days a week?

A. Yes.

Q. Do you know Mr. Gould?

A. I have met Mr. Gould.

Q. How many times have you met Mr. Gould?

A. I think I met him twice.

Q. And where did you meet him?

A. At the Whitaker House.

Q. And when did these meetings take place?

A. Well, I think one was in the first part of June before the Cooperative.

Q. Did Mr. Gould talk with you at that time?

[fol. 218] A. He did.

Q. Do you recall what he said to you?

A. Well, he said that he was talking about the business, and he said he thought if we started a Cooperative, a true Cooperative, that we could go on with our work. He thought it would be all right.

Q. About how long did he talk to you?

A. I don't know. I know he was talking to me while Mrs. Whitaker was getting ready to go to Waterville with him.

Mr. Bird: No further questions.

Cross-examination.

By Mr. Thistle:

Q. Mrs. Fernald—

The Court: Had you completed your examination, Mr. Bird?

Mr. Bird: Yes, your Honor.

The Court: Perhaps Mr. Thistle could utilize the stand for examination.

By Mr. Thistle:

Q. Mrs. Fernald, Mr. Gould was very friendly at these talks, was he not?

A. He certainly was.

Q. He was very sympathetic with the problems that Mrs. Whitaker had in marketing her articles?

A. I think so.

[fol. 218a] Q. Showed no hostility whatsoever?

A. I didn't understand the question.

Q. He indicated no hostility?

A. No, I don't think so.

Mr. Bird: Mr. Thistle.

(Counsel then conferred in a subdued tone.)

By Mr. Thistle:

Q. The purpose of his call on Mrs. Whitaker was to make an investigation under the Federal Wage Law?

A. Well, I don't know. I suppose he was; I don't know.

Q. Well, he came down to the house on business for the Department of Labor?

A. Yes, I think so.

Q. Did he talk about the records that she was keeping?

A. I don't know about that.

Q. You don't have the record? You don't personally strike that out, will you please.

You personally didn't keep the records?

A. No.

Q. You just did this trimming, in other words?

A. That's right.

Q. And Mr. Gould came in one day on official business; that is correct, isn't it?

A. Yes.

Q. And they had this talk about the line of work she was [fol. 219] conducting and the minimum wage under the Federal Law, is that correct?

A. I don't know about that; what he talked with her about.

Q. You didn't hear that talk?

A. No.

Q. Was that in another room? Was that talk in another room?

A. I think some of it was.

Q. Yes. That is, they talked in another room and then they came out where you were located?

A. Mr. Gould did.

Q. Oh, Mr. Gould came out alone and Mrs. Whitaker wasn't there at the time?

A. She was there part of the time that he was there.

Q. And how long did Mr. Gould talk to you at that time?

A. I wouldn't know how long it was.

Q. Well, was it a couple of minutes or an hour?

A. Well, it was more than two minutes.

Q. And do you recall anything else that he might have suggested other than a cooperative?

A. No.

Q. This conversation took place about two years ago?

A. It was a year ago last June, 1957.

Q. Yes a year ago last June, and the only thing that is [fol. 220] fixed in your mind is this talk about a cooperative?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And later Mr. Gould drove Mrs. Whitaker over to Waterville?

A. Yes.

Q. To see Mr. Bird?

A. Yes.

Q. The lawyer?

A. I assume so.

Q. Now, don't you recall that Mr. Gould said that he was very sympathetic with the problem that Mrs. Whitaker was having in paying the minimum wage and he didn't know any method of getting around that problem but he considered it advisable that she consult her attorney; do you recall that?

A. No.

Q. But it is a fact that he took her in—Mrs. Whitaker in his automobile and went over to see the lawyer in Waterville?

A. Yes, that was the plans.

Q. And Mr. Gould indicated a willingness to be helpful in the interpretation of this law if he could possibly be of any help?

[fols. 221-222] A. Yes.

Q. That is, he indicated that he was entirely fair about the matter and if he could be of any assistance by Mrs. Whitaker getting legal advice, that would be helpful, why

he was entirely willing that she obtain that legal advice, isn't that the impression you gained?

A. Yes.

Q. That is, he was doing a fair and impartial giving of advice as to how she might resolve her problem, isn't that a fair statement?

A. I guess so.

Q. How many women approximately were furnishing this type of merchandise to Mrs. Whitaker about the time or immediately before the Cooperative was organized?

A. I wouldn't know.

Q. Well, how many days a week were you working?

A. Oh, two or three days a week.

Q. And there was adequate items came in to keep you busy in your trimming for two or three days a week?

A. Yes.

Q. And then after the Cooperative was organized, you continued on the job?

A. Yes.

[fol. 223] ELLA MAE BANTON, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bird:

[fol. 224] Q. Are you a member of Whitaker House Cooperative?

A. Yes, I am.

Q. Are you an officer of the Cooperative?

A. Yes, I am Treasurer and one of the Directors; Chairman of the Board of Directors.

Q. You are Chairman of the Board of Directors?

A. Yes.

Q. You crochet items of the type that the Cooperative sells?

A. Yes.

Q. Do you make one type or several different types?

A. Several types.

Q. Are you familiar with the background of the Cooperative?

A. I think so.

The Court: Can the witness keep her voice up? Perhaps I will have to ask counsel to move back to insure that.

Mr. Bird: The purpose of this is to make you speak loud enough so I can hear you.

[fol. 225] By Mr. Bird:

Q. Did you answer yes to that question I asked you, whether you were familiar with the background of the Cooperative?

A. I said I think so.

Q. Were you one of the original members?

A. Yes, I was.

Q. Were you present at the organizational meeting at the Jefferson Hotel?

A. Yes.

Q. Do you receive any compensation as Chairman of the Board of Directors?

A. No.

Q. Have you attended all of the meetings of the Board of Directors?

A. Yes.

Q. When did you become Treasurer of the Cooperative?

A. I think it was October of 1957.

Q. Were you required to be bonded?

A. Yes.

Q. Now, I would like to have you tell the Court in your own words as best you can why Whitaker House Cooperative was organized?

A. Well, I understand that we were advised to form a Cooperative in order to sell our goods; that would be the best way for us to do in order to sell them.

[fol. 226] Q. How was it organized?

A. You mean, at the hotel you mean?

Q. Yes, how, can you recall the background of how it came to be organized?

A. Well, to promote the economic welfare of the mem-

bers so they could manufacture and sell knitted, crocheted and embroidered goods.

Q. Calling your attention to the meeting of the organizers or the organization meeting, do you recall why the requirement was put in the By-laws that 51 per cent of the members would constitute a quorum?

A. Well, I think that was to protect the members, but I don't think we realized that we would have so many members as we did.

Q. How many members do we have now?

A. About 200.

Q. Are they all from the immediate area around Troy and Newport?

A. No, they are all over the State of Maine practically and some in the south.

Q. There is some in the south?

The Court: South of the State of Maine?

The Witness: No.

Mr. Bird: The southern part of the country.

The Court: You mean there are members—

Mr. Bird: Outside the state.

[fol. 227] The Court: —outside the State of Maine furnishing goods to this Cooperative?

The Witness: That's right.

The Court: And some of them live in the southern states?

The Witness: Tennessee mostly.

By Mr. Bird:

Q. Who hired Mrs. Whitaker to work as General Manager for the Cooperative?

A. Well, the members and the directors.

Q. Would you describe how a person becomes a member of the Cooperative?

A. By filing a written application and submitting a sample.

Q. And where do they get these applications?

A. They are furnished by the Cooperative.

Q. I beg your pardon?

A. Furnished by the Cooperative.

Q. I show you Plaintiff's Exhibit 2 and ask you if you can identify it?

A. Yes, I can.

Q. What is it?

A. It is the By-laws of the Whitaker House Cooperative.

Q. And calling your attention to the last page, in the booklet, can you identify that?

A. Yes, it is an application for membership.

[fol. 228]. Q. Does the Cooperative send this booklet to prospective members when they make application?

A. Yes.

The Court: Mrs. Banton, the Court notes that in this application for membership form which is included in the pamphlet by-laws, which are Plaintiff's Exhibit Number 2, the applicant agrees to pay the membership fee of \$3.00, to comply with the Articles of Incorporation in the By-laws and, thirdly, "to purchase a sample and submit a copy of the sample made by myself alone to the Board of Directors . . ." for examination.

Would you explain what that last provision means: "to purchase a sample . . ." From whom? A sample of what?

The Witness: A sample of the work that they are to do.

The Court: And from whom would the applicant purchase that sample?

The Witness: Well, from the Cooperative. We have samples of work that's to be done.

The Court: So the applicant would buy a sample bootie or—

The Witness: That's right, or sacque.

The Court: —sacque and then would make a copy of it and send the copy in to the Board?

[fols. 229-234] The Witness: That's right.

By Mr. Bird:

Q. Mrs. Banton, directing your attention to the last question that the Court has asked you, has this requirement been actually enforced by the Board of Directors, that the applicants purchase an item from the Cooperative?—

A. No, I don't think it has.

Q. And have any people sent in samples of their own work to the Board of Directors or to the Cooperative rather than make a copy of one that the Cooperative already has?

A. Yes, they have.

Q. Could you explain what the purpose of that third requirement in the application is?

A. What do you mean?

Q. Perhaps I can show it to you and you could—

A. Well, to find if the quality of the work came up to standard.

[fol. 235] Q. At the meetings you attended, did Mrs. Whitaker tell you or anybody else present how the business should be run?

A. No.

Q. Did President Bird at any of these meetings tell you or anybody else present at those meetings how the meeting should be run?

A. No.

Q. What did President Bird do at these meetings?

A. At the Board of Directors' Meetings?

Q. Yes?

A. Well, he presented some of the problems that had come up for the directors to decide.

Q. And what did the directors do about these problems?

A. They voted on them.

Mr. Bird: No further questions.

Cross-examination.

By Mr. Thistle:

The Court: Before cross-examination, may the Court [fols. 236-242] inquire, Mrs. Banton, as Treasurer, your present instructions as you understand them are to pay the members every two months?

A. That's right.

Q. And how do you determine how much the members will be paid every two months?

A. Well, it depends on the amount of the sales and how much money there is available.

Q. And who makes that decision?

A. The Directors.

Q. At the monthly meeting of the directors?

A. That's right.

Q. And do the directors then tell you how much to pay out?

A. Well, I am one of the directors and we decided together; yes, they tell me.

Q. And then you, as Treasurer, follow out that vote?

A. That's right.

* * * * *

[fol. 243] The Court: The Court would like to clarify two points and then counsel will be provided an opportunity to question further if they so desire.

By the Court:

Q. Mrs. Banton, this may have been already covered, I do not recall; are you paid a salary as Treasurer by the Cooperative?

A. Yes.

Q. And how much is that salary?

A. Well, \$1.00 an hour the time I put in.

Q. \$1.00 an hour for the time you work?

A. Yes.

[fol. 244] Q. Were you, previous to the organization of the Cooperative, employed by Mrs. Whitaker?

A. No.

Q. Are you related to Mrs. Whitaker in any way?

A. No.

Q. Are you one of those ladies who sent in goods to Mrs. Whitaker prior to the Cooperative's organization?

A. I sold some to her.

Q. And also to others?

A. Yes.

Q. And since the Cooperative has been organized, have you been sending in goods to the Cooperative?

A. Yes.

Q. Now, secondly, the Court is not yet entirely clear as to the manner in which these ladies are paid by the Cooperative.

The Court understands that as you are presently operating, every two months the directors vote to pay a certain sum of money to the ladies who furnish goods, is that correct?

A. That's right, yes.

Q. And that depends on the amount of cash which the Cooperative then has?

A. Yes.

Q. And that might be a vote that the Treasurer would pay out, \$10,000, let's say, would that be right?

[fol. 245] A. Well, whatever is available.

Q. Whatever is available; assume it was \$10,000?

A. Yes.

Q. Now, how do you determine how that \$10,000 will be distributed among the ladies who have sent in goods to the Cooperative and who have not been paid in full?

A. Well, the directors vote on that 50 per cent or whatever.

Q. Well, assume that a lady had sent in a dozen booties in April of this year and that in June she had been paid half of what she was owed, let's say, and that another lady had sent in a dozen booties in June and a distribution were to be made in August, how much would those two ladies receive? In other words, if the lady who sent the goods in in April had been paid, we will say \$2.50 and was owed \$5.00, and the lady who sent her booties in in June had been paid nothing and so was owed \$5.00, now if a distribution were to be made in August, how much would each of those ladies receive?

A. Well, I pay from invoices sent to me by Mrs. Whitaker, our Manager, and I pay them from those.

Q. Well, would the lady who sent her booties in in June receive \$2.50 before anything was paid, anything more was paid to the lady who sent her booties in in April?

[fol. 246] A. Yes, the lady who sent her work in first would be paid first.

Q. Well, now the lady who sent her work in in April—

A. Would be paid before—

Q. —would be paid in full, the full \$5.00 she was owed before any payment was made to the lady who sent her booties in in June, is that correct?

A. Yes, yes.

The Court: Mr. Bird, did you wish to inquire further?

Further redirect examination.

By Mr. Bird:

Q. In reference to the questions of the Court, Mrs. Banton, you stated that the women who sent in their things first, the women are paid in chronological order?

A. Yes.

Q. The women who sent in their things in April are paid before the ones who send in their things in June?

A. Yes.

Q. And you said that—how much the women are paid depends upon how much money there is in the treasury?

A. Yes.

Mr. Bird: That's all. No further questions.

The Court: Mr. Thistle?

[fol. 247] Further recross-examination.

By Mr. Thistle:

Q. When you receive a dozen booties from one of your members, do you acknowledge receipt?

A. I don't receive them.

Q. Who receives the goods?

A. They are sent to the headquarters. Mrs. Whitaker receives them.

Q. Do you know whether or not when they receive goods whether a price is placed on the amount to be paid the persons shipping in the goods?

A. No, I do not.

Q. Has there been any?

The Court: Is there an objection?

Mr. Bird: I can't hear what the witness said, your Honor.

The Court: Would the reporter read the witness' last answer.

(The last answer was read back by the reporter.)

By Mr. Thistle:

Q. Has there been any distribution of profits over and above the amounts paid to the members for the individual items they send in?

A. No.

Q. Is the Cooperative in a financial condition at the [fols. 248-251] present time to make any distribution of excess profits?

A. No.

[fols. 252-258] FRANCIS W. JACOB, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bird:

[fol. 259] Q. Have you prepared financial statements for the directors?

A. I have.

Q. And have you presented any of these financial statements yourself at the Board of Directors Meetings?

A. I presented one myself at the meeting at Pilot's Grill in June.

[fols. 260-265] Q. And to whom do you give copies of this financial statement that you make up?

A. I give copies regularly to Mrs. Banton, to yourself, to the other directors than Mrs. Banton. On two occasions—and to Mrs. Whitaker as a matter of courtesy and information to her regularly, and on two occasions to others; in one instance to Jack Kennedy, the Vice President, and in one instance to Mr. Jiness at the Federal Trust Branch in Unity. This all being at the request under the general instructions of the directors or Mrs. Banton as Treasurer and the report, my giving the report in June at Pilot's Grill was at Mrs. Banton's request. She asked me to give it.

[fol. 266] Q. What has been the average amount of inventory maintained by the Cooperative since it started?

A. In discussing that with a view to prospective busi-

ness in the handling of inventory, we have made it—the Directors and I and Mrs. Whitaker, too—have made it an assumption that the general range is in the neighborhood of \$10,000; that immediate circumstances may vary it as much as \$1200 or \$1500 from that at any given time.

Q. Have you had occasion to compute the actual percentage of the total sales which have been paid to the membership?

A. As a percentage? I'm sorry, I misunderstood the question. Yes, it has been stated here that the intent was that the members get 60 per cent of the gross of the sales. In practical operation, it hasn't worked that way. It has been nearer 57 or 58 per cent and that also varies a little, depending on whether the majority of the items or the [fol. 267] bulk of the items sold happen to be a group on which that group markup is a little more or a little less. Those vary. It is not controlled by any overall percentage. That percentage, 60, was the anticipated percentage. 56, 57 or 58, shall we say, was the percentage that is the consequence of operation at the fixed prices and rates by which the Cooperative handles its business.

Q. Have you had occasion to estimate the rate of turnover of the inventory?

A. That is a relatively simple matter of computation which I would go at like this. These sales have been \$45,000; the inventory runs around \$10,000. That \$45,000 covers sales about 13 months which should mean roughly \$3,500 a month, so that the inventory would turn over about every three months, so to speak.

Q. And have you had occasion to try to compute the average time that it takes for an item to be sold when it is sent into the Cooperative between the time that it is sent in and the time the member actually receives their distributive share of the proceeds of the sale of that article?

A. I have never been asked to compute that, and I have not had occasion to do so on my own initiative heretofore.

[fol. 268] Q. From the information that you have in your records, could this be computed?

A. With some degree of accuracy. I think I might need to consult Mrs. Whitaker on some elements in the general stock control procedure which is something that hasn't of course—that hasn't as yet been thoroughly set up for

reasons we have been occupied in other matters. It could be, I think, ascertained with a fair degree of accuracy as to the question of how prompt individual customers are. That is readily answered, whether accounts are good or not. In general, they are very good, prompt.

Mr. Bird: I have no further questions.

The Court: Before cross-examination, the Court would wish to make inquiries. These will all relate to Defendant's Exhibit Number 6, which is a statement of Liabilities and Assets.

By the Court:

Q. On the first page under "Liabilities" the Court notes two entries. The first, "Commissions now due Mrs. Law, \$2,550; the second, "Mrs. Law, commissions due on collection, \$1,049". Who is Mrs. Law?

A. Mrs. Law is the person with whom I am not personally acquainted. I understand she is the Mrs. Doris Law who was a defendant in an action prosecuted by the Department of Labor.

[fol. 269] In connection with Whitaker House Cooperative, she—it is through sales people of hers that the Cooperative sells and their commissions are sent to her for distribution by her to them. I have no knowledge of the arrangement between her and them. We remit to her flat—Mrs. Banton remits to her flat amounts on account. We are behind with her.

Q. Is Mrs. Law the exclusive sales agent for the Cooperative?

A. I think she would be perhaps so determined; if she is the sales agent and if these people who are selling are her subordinates, the answer would be yes.

Q. Phrasing the question otherwise, are all the goods sold by the Cooperative sold through Mrs. Law?

A. That is the understanding. During last year there was a misunderstanding and a small quantity was sold by Mrs. Whitaker's own efforts. That led to a clarification of the misunderstanding and since that time sales have been entirely through Mrs. Law.

Q. And Mrs. Law is—Mrs. Law's place of business is in—

A. New York City, as I understand it.

Q. And are the goods sold by the Cooperative through Mrs. Law shipped to Mrs. Law and by her to the ultimate customers or shipped directly to the customers?

A. Directly to the customers and the customers are [fol. 270] directly billed.

Q. And Mrs. Law receives a commission on all sales then, is that correct?

A. On all sales through her when payment has been made by the customer.

Q. And that commission is, I believe it has been previously testified, 20 per cent?

A. 20 per cent.

Q. Do you know whether there is a written agreement between the Cooperative and Mrs. Law?

A. I do not of my own knowledge.

Q. Do you know whether Mrs. Law had the same arrangement with Mrs. Whitaker prior to the organization of the Cooperative?

A. I know nothing about that.

Q. You prepared Mrs. Whitaker's personal Federal Income Tax Return for the year 1957?

A. That's correct.

Q. Had you prepared it for any prior year?

A. No.

Q. And you have been authorized by Mrs. Whitaker to disclose information with respect to that return?

A. That's quite correct.

Q. Can you inform the Court as to what her income from the business which she conducted, or what was her income from the business which she conducted during the first [fol. 271] half roughly of 1957?

A. That, your Honor, is not as simple a question as it might appear. Mrs. Whitaker reports on the cash basis; has always reported on the cash basis. Consequently, for the year, or rather for that portion of the year on which I reported for her, she showed a substantial cash deficiency by reason of the fact that she made very few sales; that her accounts receivable were cleared up quite early in the year, other than the account of Mrs. Law which was involved in the impounding of various articles. Her sales will have been during the year as a matter of estimate only because we did not examine the sales problem, she being on

the cash basis and estimate only her sales in the first part of the year may have been as much as \$6,000, or \$7,000.

She showed a loss by virtue of the fact that she had heavy expenses; so reported. I took the matter up with Internal Revenue and they approved the method of reporting which showed her with a loss.

Q. Would you have an opinion, based upon the analysis of her affairs, which you made in preparing her 1957 income tax return, as to the income which Mrs. Whitaker might have anticipated from the business as it was individually operated by her during the 12 months' period prior [fol. 272] to the organization of the Cooperative?

A. My impression would be and it is an impression only, your Honor—my impression would be that during her operations of the most recent years, perhaps four or five, she had not made a great deal of money. She had built up inventory rather steadily. I would suppose that her actual cash income would have been, as she, I am informed, had been reporting it; that is insufficient to warrant a payment of any income tax on the net income.

Q. Would it be your opinion, Mr. Jacob, that the salary of \$55.00 per week which the Cooperative has agreed to pay Mrs. Whitaker, if paid by the Cooperative, would be more than the income which Mrs. Whitaker would have made from the business as conducted by her previous to the organization of the Cooperative?

A. My impression would be yes.

Q. Would it be twice as much?

A. That would return to the question do we look at the cash basis or at the general accrual of her net worth? On the cash basis, if she had been paid \$2,860 in a year, it would have been more cash than she had previously netted by a substantial amount, I would suppose. If we take into consideration that she had been building inventory over a few years, the difference would not be so great. May I phrase [fol. 273] it another way?

Q. That is sufficient. Referring to the "Profit and Loss Statement," which is included in Defendant's Exhibit Number 6, does the Court understand from that statement that with a gross profit of \$14,637 from its organization to September 4, 1958, the Cooperative has had total costs of \$19,174, or a net loss of \$4,537?

A. That's correct.

Q. With that statement, what factors are present which will permit this Cooperative to survive as a financially solvent enterprise in your opinion?

A. On the statement which I prepared for the meeting in June, that meeting up at Pilot's Grill, I gave what I think you would characterize as a tentative prospective budget. That's—what I was getting at was this. At what level of the Cooperative's business could it carry these—this overhead and come out even or yield the members this distributor's share that they are supposed to get if there is one? At \$60,000 gross which would correspond not to the \$14,000 gross profit but to the \$45,000 on the following page, that's the total sales, \$60,000, they could not by any means carry this overhead. If the business were approximately doubled and ran shall we say from \$85,000 to \$90,000 gross sales, the ratio of commissions and payments to members [fol. 274] would be unchanged. The remainder which would be left for overhead would be sufficiently large so that something at this general level of overhead could be carried. One factor, of course, is that Mr. Bird's salary contemplates this present litigation. What the directors and Mr. Bird have in mind with reference to the future in case the outcome should be favorable to them is something with which I have had no occasion to deal. I should suppose that that could be a factor in the question of the successful and profitable operation of the business in the future.

Q. There can be no question that with the present gross sales, the overhead is excessive?

A. It is disproportionate, yes.

Q. If the gross sales were roughly doubled, in your opinion, the Cooperative could carry that overhead perhaps with some modification?

A. Other things being equal, I should think definitely yes.

The Court: Mr. Bird?

By Mr. Bird:

Q. Mr. Jacob, calling your attention to some of the problems faced by the Cooperative during the period of December, 1957, and January and February of 1958, did there at that time occur an excessive increase in the inventory?

[fol. 275] A. I think I could almost state that as a matter of my own knowledge. I went over the matter so many times with Mrs. Whitaker who was trying to watch the stock control situation, which as I have mentioned is something still not really and properly controlled.

During the fall, the late fall, after the Cooperative gained momentum, the members sent in material in tremendous quantities, not being aware—after all, they have no reason to be aware—that the big season for the Christmas merchandise and various cities where customers are situated is not just before Christmas but is back in August and September; consequently, this accumulated to a substantial amount and it was the largest inventory the Cooperative had; it certainly had at that period.

Q. And would you say in your opinion that the Cooperative was placed in financial difficulty because of this increase in inventory?

A. Well, I would say that is almost elementary. Anything that comes in, goes into—it doesn't go into overhead, it goes into one of two things. It goes into cash or into merchandise, so to speak. You have one——

The Court: But, Mr. Jacob, the inventory would not explain the net loss shown on your profit and loss statement? [fol. 276] The Witness: Oh, no, I was answering, your Honor, about the cash deficiency.

The Court: And as of September 4, in your opinion, as the Court understands it, the inventory which shows that \$10,024 would not be considered excessive?

The Witness: No, reasonable.

The Court: The Court understood you to state that was what the directors felt was about right?

The Witness: Yes, and during that period the inventory was turning over fast. It was, if anything, reducing somewhat during that period, as a result of the rapidity of orders coming in.

Mr. Bird: I have just one more question, your Honor, and I will be finished.

By Mr. Bird:

Q. Do you recall offhand what the maximum amount of inventory the Cooperative has had?

A. We have assumed that at the time of the high inventory early this calendar year of which you spoke a moment ago, the inventory may have been abnormally high to the level of perhaps as much as \$13,000 or thereabouts. We did not at that time in midstream, so to speak, half way through February make a specific computation. We were scarcely in a position to then because we hadn't had but two physical inventory counts. Then, we find now our [fol. 277] computations are probably about right if in this February a similar situation should arise, I believe that my computation—we could tell within a few hundred dollars what inventory was there without counting it.

The Court: Was your answer, Mr. Jacob, that the maximum inventory at any time was approximately \$13,000?

The Witness: That's an assumption purely, but I would suppose at that time it may have been as much as that.

Mr. Bird: No further questions.

Cross-examination.

By Mr. Thistle:

Q. Mr. Jacob, isn't it a fact that due to the present overhead, and other conditions of the last two or three months that the Cooperative has been losing money?

A. The Cooperative has certainly been losing money. Whether I would bracket it to that precise period, I would not say. A comparison of the June and September statements would show. There has been a loss during the summer, yes; at a less pace than earlier.

Q. And if they continue to operate as they are at the present time, they will have an additional loss each month? [fol. 278] A. They will have a continuing deficit unless they can increase their gross business in case they go on.

Q. And that means that monthly, month by month, under the present business arrangement, they are weakening their financial condition?

A. I couldn't go that far, Mr. Thistle. You will see a business fight through a difficult period and pretty soon something will break and then it will do well; that is by if you draw a line along a chart or a graph following what has happened before.

Q. Eliminating the unexpected and the extraordinary breaks and so forth, reflecting on the last few months' operation, would you say they have lost money month by month?

A. That they have in the past?

Q. Yes. If that same situation continues from month by month in the future, month by month they will be weakening their financial condition?

A. Well, as an academic question, yes, if they have been losing.

Q. It is a monetary question, too, isn't it?

A. It is a practical question. I stick to my previous answer, Mr. Thistle.

Q. Your previous answer, if something unexpected happens?

A. No, not at all, Mr. Thistle. This is not the unexpected. [fol. 279] What is expected is that if fortunately for them the Cooperative and its officers should prevail in this action, they will be swamped with business. Many people, there is no question, are waiting to see how this comes out and who have said they won't send anything into the Cooperative until they know that the Cooperative is going on, in which case—

[fol. 280]

PLAINTIFF'S EXHIBIT #1

By-Laws of Whitaker House Cooperative, Inc.

[fol. 281] By-Laws of Whitaker House Cooperative, Inc.

The objective of the Whitaker House Cooperative, Inc. is to promote the economic welfare of members and to perform any and all other related functions found desirable by the Cooperative to further the economic welfare of the members.

Article 1.

The name of this Cooperative is Whitaker House Cooperative, Inc. and its principal office is at Troy, Maine.

Article 2

The Cooperative shall have perpetual existence.

Article 3

Section 1. The Cooperative is formed not for profit and shall not have capital stock.

Section 2. The signers of the Articles of Association shall all be members of the Cooperative. In addition to the incorporators, any person, firm, or corporation may become a member of the Cooperative by: (a) acquiring a membership interest in the Cooperative, as shall be specified in the By-laws of the Cooperative; and (b) agreeing to comply with and be bound by the terms and conditions relating to membership contained in the articles of Incorporation and the By-laws of the Cooperative and any amendments thereto; provided, however, that no applicant for membership shall become a member of the Cooperative unless and until [fol. 282] the applicant has been accepted for membership by the members, or by the Board of Directors or by its duly authorized representative. No person in the organization shall own more than one share interest in the Cooperative.

Section 3. Each member in good standing shall be entitled to one vote on any single subject, which vote shall be cast in person and not by proxy.

Section 4. The By-laws of the Cooperative may define and fix the duties and responsibilities of the members and prescribe such other terms and conditions upon which members shall be admitted to and retain membership in the Cooperative.

Article 4

Section 1. The excess receipts of the Cooperative shall not be used to pay dividends to members on their membership interests. Receipts shall be used in the manner to be provided in these By-laws.

Section 2. No member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment.

Article 5

Section 1. The directors of the Cooperative shall be elected by and from the members of the Cooperative. The

number of directors shall be fixed from time to time by the By-laws of the Cooperative.

Section 2. The members of the Cooperative shall have the power to make, amend or repeal the By-laws of the Cooperative.

[fol. 283] Article 6. Membership

Section 1. Eligibility. All persons, including married women and minors, firms and corporations shall be eligible for membership.

Section 2. Application for Membership. A person who is not one of the incorporators, in order to be admitted to membership, shall file with the Cooperative an application for membership in such form as shall be provided by the Board of Directors. The application form shall include, in addition to such information as the Board of Directors may determine, a statement that the applicant agrees to (1) comply with and be bound by the terms and conditions relating to membership contained in the Articles of Incorporation and in these By-laws and amendments thereto; and (2) acquire a membership interest in the Cooperative.

Section 3. Members. The members shall consist of the incorporators and such applicants as have been approved by the members or by the Board of Directors, or by its duly authorized representative. An application for membership may be approved if it is believed that the acceptance of the application will be for the mutual benefit of the members and consistent with the accomplishment of the corporate purposes.

Section 4. Transfer of Membership Interest. The membership interest shall not be transferable.

Section 5. Expulsion. The Board of Directors may expel any member of the Cooperative at any duly convened meeting for failure to comply with the By-laws or with any rules [fol 284] or regulations of the Cooperative provided that five days' notice has been given to the member in writing indicating the intention to cause the expulsion and the specific reason therefor and provided that the member is given an opportunity to appear and be heard. An appeal from the action of the Board can be taken by filing, within twenty days after the action, a petition, signed and sworn to by the member, with the Secretary of the Cooperative

which petition is to be acted upon by the members at the next meeting after the petition is filed. In the event of expulsion, the member shall no longer be entitled to the rights, privileges and benefits of membership.

Section 6. Withdrawal from Membership. A member may not withdraw from membership until he or she has been a member for at least one year. In the event of withdrawal the existing liabilities of the members to the Cooperative shall not be affected.

Article 7. Meetings of Members

Section 1. Place of Meetings. All meetings of members shall be held at the principal office of the Cooperative or at such other place as the Board of Directors, from time to time, may determine.

Section 2. Annual Meetings. An annual meeting of the members shall be held on the fourth Thursday of June each year at ten o'clock a.m.

Section 3. Special Meetings. A special meeting of the members may be called at any time by the President and must be called by him when so directed by a resolution of the Board of Directors or by a written request signed by [fol. 285] at least ten per centum of the members of the Cooperative, provided that the resolution or request specifies the purpose of the special meeting. No business may be transacted at any special meeting unless such business was specified in the notice for such meeting. Business which should have been transacted at a regular meeting may be transacted at an ensuing special meeting, if such business was specified in the notice of the special meeting.

Section 4. Notice of Meeting. Notice of all meetings and of any unusually important business to be transacted at the meeting shall be mailed or delivered not less than two weeks before such meetings and in the case of a special meeting the purpose or purposes shall always be specified in the notice.

Section 5. Quorum. Fifty-one per centum of the members shall constitute a quorum at any meeting but the members present at a duly organized meeting may continue to do business until adjournment notwithstanding the withdrawal

of enough members to leave less than a quorum. If a meeting cannot be organized because a quorum has not attended, those present may adjourn the meeting to such time and place as they may determine.

Section 6. Adjournments. Adjournment or adjournments of any organized or unorganized annual or special meeting of members may be taken. Upon such adjournment it shall not be necessary to give any notice of the adjourned meeting or of the normal business to be transacted other than by announcement at the meeting at which such adjournment is taken.

[fol. 286] **Section 7. Order of Business.** The order of business at regular meetings, and in so far as possible at other meetings of the members, shall be as follows:

- (1) recording of the member present by the number thereof or by their names;
- (2) reading of notice of meeting;
- (3) reading and action on the record of all proceedings and of all meetings which remain unapproved;
- (4) reports of the Board of Directors, and of officers and committees;
- (5) presentation of profit and loss statement and balance sheet, audited by a committee, consisting of three persons who are not directors, officers or employees and who are elected by and from the members;
- (6) elections;
- (7) unfinished business;
- (8) new business; and
- (9) adjournment.

Section 8. Voting. A member shall be entitled to only one vote upon any single subject, which vote shall be cast in person and not by proxy. At any meeting of members, all elections and questions shall be determined, except as is specifically provided otherwise by law or by these By-laws, by the votes of a majority of the members present in person. No member shall be permitted to vote at any meeting of the Cooperative if he owes to the Cooperative any obligation which is past due, and if he has been sent

notice that he will not be permitted to vote until his past due obligation is paid.

[fol. 287] Section 9. Elections. At all elections, nominations shall be made from the floor. Unless there is no contest, the voting shall be by closed ballot.

Section 10. Election of Delegates. Prior to the annual meeting, notice of items of new business to be voted on at the annual meeting will be sent to all members. Local election of a member delegate to attend the annual meeting may be held prior to the annual meeting. It shall be the function of an elected delegate to represent the members who have elected him and to present a report at the annual meeting as to how the local members voted on the issues which were contained in the above described notice.

Article 8. Board of Directors.

Section 1. Number. The affairs of the Cooperative shall be managed by a Board of Directors consisting of five persons elected by and from the members of the Cooperative.

Section 2. Term of Office. The Board of Directors elected at the first meeting of the members shall hold office until their successors assume office. A director shall be eligible for reelection at the expiration of the term of his office. Directors shall be elected for a term of one year.

Section 3. Removal of Directors. Any director may be removed from office with or without cause by a vote of not less than seventy-five per centum of the members of the Cooperative present at any meeting, the notice for which includes such purpose. If a director is removed, the members may at the same meeting fill the vacancy.

Section 4. Vacancies. In the event of any vacancy in the Board of Directors through death, resignation or other [fol. 288] cause, but not if a director has been removed or if the number of directors has been increased, the remaining directors may by a majority vote to elect a successor to hold office until the next meeting at which time a director shall be elected to complete the term of the director whose place was vacant.

Section 5. Duties of the Board. The duties and powers of the Board of Directors, in addition to those imposed elsewhere in the By-laws, and in addition to those necessary or

appropriate for the proper conduct of the affairs of the Cooperative shall be as follows:

- (a) to manage the affairs of the Cooperative and to make all proper rules and regulations in connections therewith;
- (b) to borrow money for the Cooperative, and to make, execute and issue mortgages, bonds, deeds of trust, trust agreements and any negotiable or other instruments and securities secured by mortgage or otherwise;
- (c) to enter into such contracts as may help effectuate the purpose of the Cooperative.
- (d) to appoint committees composed of members and to delegate to them any duties that are required to be executed and to require such committees to report to the Board of Directors or to the members.
- (e) to make such reports at the annual meetings as are necessary to disclose in detail the financial condition of the Cooperative, the compensation of directors, officers and employes and the status of the affairs of the Cooperative; and
- [fols. 289-290] (f) to consider and pass upon application for membership or to authorize an officer or representative of the Cooperative to consider and pass upon applications for membership.

Article 9. Meetings of Board of Directors

Section 1. Place of Meetings. All meetings of the Board of Directors shall be held at the principal office or at such other place as the Board of Directors, from time to time, may determine.

Section 2. Regular Meetings. Regular meetings of the Board of Directors shall be held immediately after the annual meeting of members and once a month thereafter at such time and date as may be fixed by the directors for regular meetings.

Section 3. Special Meetings. Special meetings of the Board of Directors may be called at any time by the president or by three directors.

Section 4. Notice. No notice shall be required for regular meetings of the Board of Directors but for special meet-

ings notice shall be mailed or delivered not less than five days before the meeting and the notice shall state the purpose of the meeting and no other business shall be transacted except with the unanimous consent of all the directors holding office.

Section 5. Quorum. A majority of all the Directors elected shall constitute a quorum for the transaction of business at any meeting.

Section 6. Official Acts of the Board. Each of the official acts of the Board of Directors shall be by a majority vote [fol. 291] of the directors present, and shall be recorded with the years and days of each director or the unanimous approval thereon in the minute book of the Cooperative.

Article 10. Officers and Employees

Section 1. Election of Officers. The members of the Cooperative at the annual meeting shall elect a President, Vice-President, Secretary and Treasurer, all of whom shall be members of the Cooperative and shall hold office for one year and until their successors are elected and assume office. The same person may be elected to hold the office of Secretary and Treasurer. The officers as such shall not be directors but may participate in meetings of the Board of Directors without the power to vote at such meetings. A person may be both an officer and a director.

Section 2. Duties of President and Vice-President. The President shall preside at all meetings of members or of directors. He shall rule on all questions and points of order that may arise during the course of meetings and shall not vote except at meetings of the members if there is a tie or at meetings of the Board of Directors if he is a director. Except as otherwise provided by resolution, he shall sign or countersign all checks, notes, bonds and other evidences of indebtedness issued by the Cooperative, all certificates issued to members, all contracts and other official instruments or documents of the Cooperative. In the absence of the President, or in the event of his inability or refusal to act, the Vice-President shall act in his stead.

Section 3. Duties of Secretary. The Secretary shall send notices of all meetings and keep minutes thereof. She [fol. 292] shall have charge of the seal, membership books,

papers, documents and other records belonging to, or in the possession of, the cooperative.

Section 4. Duties of Treasurer. The Treasurer shall have custody of all funds and securities of the Cooperative. He shall deposit in the name of the Cooperative all funds together with notes, checks or similar instruments endorsed by him for collection in such places as the Board of Directors may designate. Receipts and vouchers for payments shall be signed by him. Except as otherwise provided by resolution, he shall, jointly with the President, sign or countersign all checks, notes, bonds or other evidences of indebtedness. He shall keep complete books of account and shall make monthly reports to the Board of Directors showing in detail the financial condition of the Cooperative, including a list of all members indebted to it, the amount of their indebtedness and the nature of their indebtedness. He shall pay obligations of the Cooperative when due and shall otherwise make disbursements under the discretion and approval of the Board of Directors. He shall before entering upon the discharge of his duties become bonded with a responsible surety company in such sum and form as the Board of Directors may require and approve.

Section 5. Additional Duties. In addition to the duties herein enumerated, the officers shall perform such other duties as, from time to time, may be assigned to them by the Board of Directors.

[fol. 293] **Section 6. Removal of Officers.** Any officer may be removed from office with or without cause by a vote of not less than seventy-five per centum of the members of the Cooperative present at any meeting, the notice for which shall include such purposes. If an officer is removed, the members may at the same meeting fill the vacancy.

Section 7. Manager. There shall be a manager who shall be selected by the Board of Directors. He shall have general supervision over the property and the affairs of the Cooperative, subject always, however, to the direction, management and control of the Board of Directors. He shall make monthly written reports to the Board of Directors which shall set out in detail the general condition of the Cooperative. The manager shall further perform such other duties as from time to time may be assigned to him by the Board of Directors. He shall before entering upon the

discharge of his duties become bonded with a responsible surety company in such sum and form as the Board of Directors may require and approve.

Section 8. The Treasurer shall have the authority to sign checks without the signature of the President.

Article 11. Disposition of Receipts

Section 1. Ascertainment of Excess Receipts. The receipts of the Cooperative during each year shall be first employed for the payment of all its operating expenses, including without limitation, wages, salaries, taxes, main-[fol. 294] tenance, repairs, upkeep, replacement, insurance and interest, and for the payment of any other obligations of the Cooperative as they may become due. The balance shall be considered as the excess receipts of the Cooperative.

Section 2. Application of Excess Receipts. The excess receipts of the Cooperative as determined in the manner set forth in Section 1 of this article shall annually be applied to: first, writing off preliminary expenses; second, necessary depreciation reserves; and third, establishment of a capital reserve. The balance, or any part thereof, may, in the discretion of the Board of Directors, be used for patronage refunds which will be distributed according to the percentage of work submitted to the Cooperative for sale.

Article 12. Membership Interests and Certificates Therefor

Section 1. Capital. The capital of the Cooperative shall consist of the aggregate amount standing to the credit of members on account of the membership interests allotted to them. A membership interest shall cost Three Dollars and shall be paid in full before a membership certificate is issued.

Section 2. Form of Membership Certificates. Membership certificates shall be consecutively numbered and bound in one or more books and shall be issued in order therefrom; and on the stub thereof opposite each such certificate shall be entered the name and address of the owner, together with the date of issue, and each certificate shall be receipted for upon such stub or shall have affixed thereto [fol. 295] a post-office receipt. The certificate shall exhibit the name of the holder and shall be signed by the President

and by the Treasurer or Secretary. The certificate shall be sealed with the seal of the Cooperative unless an engraved or printed facsimile thereof shall be represented thereon. Every such certificate, among other things, shall state that:

- (a) no dividends or interest shall be payable upon the certificate except in the manner and limited amount as provided for in the by-laws;
- (b) all members have the right to but one vote;
- (c) the certificate is not transferable; and
- (d) no person, partnership or corporation may own more than Three Dollars worth of membership interest.

Section 3. Issue of Certificates. Membership certificates shall be issued to each member only after they have been paid for in full.

Section 4. Lien of Certificates. The certificates of all members shall be subject to any and all debts owned to the Cooperative by such members and the Cooperative shall have a lien upon the shares of members and upon all moneys due to the members for any debts owing by the members to the Cooperative.

Article 13. Miscellaneous

Section 1. Adoption and Form of Seal. The seal of the Cooperative shall contain the name of the Cooperative in the form as impressed in the margin hereof and the seal in that form shall be, and is hereby adopted as, the official seal of the Cooperative.

[fol. 296] Section 2. Amendments to By-laws. The By-laws of the Cooperative may be altered, amended, rescinded or added to by the vote of a majority of the members present at a special meeting convened for such purpose or at a regular meeting, but the notice of the special or regular meeting, must set forth fully and clearly the proposed alteration, amendment, rescission or addition.

Section 3. Agreement of Members. Members shall not make for or sell to any wholesale or retail business any knitted, crocheted or embroidered articles which are the same or similar to the products being produced by the Cooperative except in the case where a member has submitted work to the Cooperative and has received it back as being

defective or the Cooperative has been unable to sell it after a reasonable effort has been made to sell the article. Members will obtain all of their materials from the Cooperative.

[fol. 297] WHITAKER HOUSE COOPERATIVE, INC.

Application for Membership

I hereby apply for membership in the Whitaker House Cooperative, Inc. and in consideration of the acceptance of this application agree:

- (1) to pay for a membership interest of \$3; (Membership interest fee of \$3 must be sent in with this application)
- (2) to comply with and be bound by the Articles of Incorporation and By-laws, and all amendments thereto, of the Cooperative; and
- (3) to purchase a sample and submit a copy of the sample made by myself alone to the Board of Directors of the Cooperative for examination and determination as to whether or not I am qualified to become a member of the Whitaker House Cooperative, Inc.

The acceptance of this application by the Cooperative shall constitute an agreement between the Cooperative and the undersigned upon the terms hereinabove set forth.

Signed this — day of —, 195—.

—, —, Applicant.

—, —, Witness.

The above application for membership was accepted by Whitaker House Cooperative, Inc. the — day of —, 195—.

Whitaker House Cooperative, Inc., By —, —, Secretary.

[fol. 298]

DEFENDANTS' EXHIBIT #2

Whitaker House Cooperative, Inc.

Articles of Association and Minutes

Incorporated

1957

[fol. 299]

Articles of Association

We, the undersigned, hereby associate ourselves together for the purpose of forming a nonprofit cooperative corporation under the General Laws of the State of Maine to be called Whitaker House Cooperative, Inc.

The purposes of said corporation are:

1. To manufacture, sell, and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail.

2. To purchase, lease or otherwise acquire and to hold, use, manufacture or otherwise dispose of any materials and products which may be involved in the carrying on of the aforementioned business.

3. To do any and all lawful acts and things necessary, pertaining, convenient or incidental to the foregoing purposes or any part thereof tending to increase the value, usefulness, comfort or convenience of the property or any part thereof at any time held by said corporation, and to have or exercise all the rights, powers and privileges appertaining to corporations of a similar nature organized and existing under the laws of the State of Maine; but not, however, to have or exercise any right, power or privilege for any purpose for which corporations are not permitted to be formed under the General Laws of the State of Maine as provided in Sections 1 to 24 both inclusive, of Chapter 56 of the Revised Statutes of Maine, 1954, and acts amendatory thereof or additional thereto.

We do hereby waive all requirements of the statutes of Maine as to the notice of first meeting for organization,

and hereby fix the ninth day of July, 1957, at 10:00 o'clock in the morning, at the Jefferson Hotel, Waterville, Maine, as the time and place of such first meeting, and further we hereby consent to the transaction of such business as may properly come before said meeting or any legal adjournment thereof.

Dated this ninth day of July, 1957.

Wilhelmine C. Edmonds

Dora M. Fernald

Verna W. Mitchell

Audrey A. Leavitt

Ethel D. Whitcomb

Sally M. Fernald

Lillian E. Cook

Nellie Clark

Ella C. Hunt

Fannie Johnson

Bernice Hall

Mrs. Fernande Loubrier

Mrs. Arthur W. Pelletier

Pearl Shorey

Mrs. Raymond Dearing

Mary Waring

[fol. 300] Gertrude Nason

Ella Mae Banton

Nettie M. Boyington

Mrs. W. E. Walcott

Mrs. Martin E. Ireland

Mrs. Margaret Tweedie

Mrs. Marilyn Owen

Florence Howe

Lena McGinnis

Alma Gerry

Philis S. Bird

Evelyn M. Whitaker

[fol. 301] Minutes of the First Meeting of Members

Pursuant to the foregoing Articles of Association and Waiver of Notice, the associated met at the Jefferson Hotel, Waterville, Maine, on the ninth day of July, 1957 at ten o'clock in the morning for the purpose of organization.

There were present in person all of the signers of the foregoing Articles of Association. The meeting was called to order by Philip S. Bird who was made Temporary Chairman and presided. Mrs. Wilhemina Edmonds was made Temporary Clerk, and was duly sworn according to the following original record of her oath:

STATE OF MAINE,

Kennebec, ss:

July 9, 1957.

Personally appeared Mrs. Wilhemina Edmonds and made oath that she would faithfully and impartially perform the

duties devolving upon her as Temporary Clerk of Whitaker House Cooperative, Inc.

Before me, Philip S. Bird, Notary Public.

Upon motion duly made and seconded, it was unanimously voted that the original Articles of Association and Waiver of Notice be made a part of the minutes of this meeting.

Upon motion duly made and seconded, it was unanimously voted that we proceed to organize a non-profit cooperative organization under Chapter 56 of the Revised Statutes of Maine.

Three names were proposed for the cooperative. They were Maine Home Workers Cooperative, Inc., United Home Workers Cooperative, Inc., and Whitaker House Cooperative, Inc. The name selected by vote of the majority of the associates was Whitaker House Cooperative, Inc.

A discussion followed as to what the purposes of the corporation should be and a proposed set of purposes was presented to the members. The proposed purposes limited [fol. 302-307] the members to making products for babies, infants, and children. By unanimous vote of the associates, the purposes were amended to allow making all types of knitted, crocheted, and embroidered goods.

It was unanimously voted that the purposes stated in the Articles of Association, as amended, be adopted as the corporate purposes of this corporation.

The Chairman presented a form of by-laws of the affairs of management which were presented to the organization and which were read article by article, unanimously adopted, and ordered to be inserted at length in the minutes of this meeting, as follows: (Printed as Plaintiff's Exhibit 2, supra)

[fol. 308] After the adoption of the foregoing by-laws, the chairman announced that sixty-four associates had paid the original subscription fee of Two Dollars.

The meeting then proceeded to the election of officers. Nominations having been made and voted thereon, the

chairman stated that the following had been unanimously elected to their respective offices:

{fol. 309] Directors: Mrs. Fernande Loubier, Winslow
 Mrs. Dana Banton, Newport
 Mrs. Audrey Leavitt, Hampden
 Highlands
 Mrs. Nettie Boyington, Lincoln
 Mrs. Harold Edmonds, Burnham

Clerk: Stanley L. Bird

The Clerk was then duly sworn, according to the following original record of oath:

July 18, 1957.

STATE OF MAINE,
 Kennebec, ss.:

Personally appeared Stanley L. Bird and made oath that he would faithfully and impartially perform the duties devolving upon him as Clerk of Whitaker House Cooperative, Inc.

Before me, Philip S. Bird, Notary Public.

Upon motion duly made and seconded, it was unanimously voted that the Board of Directors meet forthwith and complete organization of the Corporation by election of a President, Vice-President, and Secretary-Treasurer, and the President, Treasurer, and a majority of the Directors forthwith prepare the Certificate of Organization required by the laws of Maine, and to cause the same to be recorded and filed in the various offices as required by law.

The Chairman reported that no further corporated business could be transacted until the above-mentioned Certificate of Organization had been approved by the Attorney General, recorded in the Registry of Deeds for Waldo County, and a copy thereof, attested by said Register, filed with the Secretary of State.

There being no further business to come before the meeting, upon motion duly made and seconded, it was unanimously voted to adjourn.

Adjourned.

A true record:

Attest: Stanley Bird, Clerk.

[fol. 310] Waiver of Notice of the First Meeting of the
Board of Directors

We, the undersigned, being the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine corporation, do hereby waive notice of the time and place of the first meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the ninth day of July, 1957 at 3:45 o'clock in the afternoon as the time, and the Jefferson Hotel, Waterville, Maine as the place of the first meeting of the Board of Directors. The purpose of said meeting is the election of officers and the transaction of such other business as may be legally necessary to complete the organization of this Corporation.

Dated this ninth day of July, 1957.

Ella Mae Banton, Wilhelmine C. Edmonds, Mrs.
Fernande Loubier, Nettie M. Boyington, Audrey
A. Leavitt.

Minutes of the First Meeting of the Board of Directors

The first meeting of the Board of Directors of Whitaker House Cooperative, Inc. was held at the Jefferson Hotel, Waterville, Maine, on the ninth day of July, 1957, at 3:45 o'clock in the afternoon. There were present in person Mrs. Fernande Loubier, Mrs. Dana Banton, Mrs. Audrey Leavitt, Mrs. Nettie Boyington, and Mrs. Harold Edmonds being all of the directors of this corporation.

[fol. 311] The meeting was called to order by Mrs. Wilhelmina Edmonds, Temporary Clerk, and upon motion duly made and seconded, it was voted that Mrs. Dana Banton serve as Temporary Chairman. The Clerk thereupon assumed the duties required of her by the by-laws of the Corporation.

The waiver of notice of this meeting, signed by all the Directors, was presented, and it was ordered that this waiver of notice be made a part of the records of this meeting.

The meeting then proceeded to the election of Chairman of the Board of Directors. The nominations having been made and ballots having been cast thereon, the Chairman of the Board of Directors was Mrs. Dana Banton.

The duly elected Chairman of the Board of Directors then presided and the meeting proceeded to the election of officers. Nominations having been made and ballots having been cast thereon, the Chairman reported that the following persons had been unanimously elected to their respective offices:

President: Philip S. Bird

Vice-President: Jack Kennedy

Secretary-Treasurer: Evelyn M. Whitaker

The above-named persons were declared elected to their respective offices.

Upon motion duly made and seconded, it was unanimously voted that the Certificate of Organization required by the laws of Maine be forthwith made, recorded, and filed.

There being no further business to come before the meeting, it was, upon motion duly made and seconded, unanimously voted to adjourn.

Adjourned.

A true record:

Attest: Stanley Bird, Clerk.

[fol. 312] Waiver of Notice of the Second Meeting of the
Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Co-operative, Inc., a Maine corporation, do hereby waive notice of the time and place and the second meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the twenty-fourth day of July, 1957 at 2:00 o'clock in the afternoon as the time, and the residence of Mrs. Evelyn Whitaker as the place of the second meeting of the Board of Directors. The purpose of said meeting is to determine membership requirements and to review pending membership applications and to transact such other business as may come before the Board of Directors.

Dated this twenty-fourth day of July, 1957.

Ella Mae Banton, Wilhelmina C. Edmonds, Mrs.
Fernande Loubier, Nettie M. Boyington, Audrey
A. Leavitt.

Minutes of the Second Meeting of the Board of Directors

The second meeting of the Board of Directors was held at the principal place of business of the Cooperative at Troy, Maine, on July 24, 1957, at 2 o'clock in the afternoon. All of the directors were in attendance as well as Philip S. Bird President and Evelyn Whitaker Secretary-Treasurer. The minutes of the first meeting of the Board of Directors were read and accepted. The purpose of this meeting was to [fol. 313] establish procedure for handling membership applications and to discuss possible methods of cutting costs. After discussion the Directors voted that membership should be processed in the following way: Application for membership would be left to the Director living nearest the applicant and who would either contact the applicant personally or by mail and give each applicant a booklet which is being printed of the by-laws and which will also include an application for membership. The Directors will give a sample to the applicant for her to copy, which sample will be paid for by the applicant. When the applicant has finished making a copy of the sample, she will submit to the Director a sample along with her application and membership fee of \$3. The Director will examine the applicants work and either recommend that she not be admitted or that she will be admitted. The Director will then forward to the Secretary-Treasurer the application, membership fee and sample of work with the Directors recommendation. The Secretary-Treasurer will examine the applicants work and if she concurs with the Director's recommendation she will report the same to the President who will either send a membership certificate to the applicant or will advise her that her application has been refused. If the Secretary-Treasurer does not concur with the recommendation of the Director the application will be submitted to the next meeting of the Board of Directors. The vote of the Board of Directors shall be final on all applications.

The Directors discussed the problem of shipping finished goods to the Cooperative office and agreed that they would try to get all the members in their area to ship their individual work together in one large package toward the end of each month. The Board of Directors also voted to have the Secretary-Treasurer bonded in the amount of

\$2000. The Directors also decided by a unanimous vote that the Cooperative would purchase all of Mrs. Whitaker's inventory and accounts receivable as of the date of incorporation. By a unanimous vote the Directors agreed to have inventory of the cooperative insured for fire for \$3000. There being no further business to come before the meeting, the meeting was adjourned at 4:30.

[fol. 314] Waiver of Notice of the Third Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine corporation, do hereby waive notice of the time and place of the third meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the twenty-second day of August, 1957, at 2:00 o'clock in the afternoon as the time, and the residence of Mrs. Evelyn Whitaker as the place of the third meeting of the Board of Directors. The purpose of said meeting is to discuss employment contracts for sales managers and time and conditions of payment to the members and to transact such other business as may come before the Board of Directors.

Dated this twenty-second day of August, 1957.

Ella Mae Banton, Fernande Loubier, Wilhelmina C. Edmonds.

Minutes of the Third Meeting of the Board of Directors

The third meeting of the Board of Directors was held at the principal place of business of the Cooperative at Troy, Maine, on August 22, 1957, at 2:00 o'clock in the afternoon. All of the directors were in attendance with the exception of Mrs. Leavitt and Mrs. Boyington. President, Philip Bird and Evelyn Whitaker, Secretary-Treasurer were also present. The minutes of the second board of directors [fol. 315] meeting was read and accepted. The purpose of this meeting was to discuss sales manager contracts between the Cooperative and Mrs. Doris Law and to discuss methods of setting dates for payment of the members.

Upon a motion seconded and passed it was ordered that all the goods submitted by the members for sale should be sent in before the tenth of the month and would be paid for on or before the twentieth of that month. Any material received after the tenth would not be paid for until the twentieth of the following month. Upon a motion seconded and passed by the board, the president was directed to draw up a contract between the Cooperative and Mrs. Doris Law to be submitted to the Board of Directors for approval before sending it to Mrs. Law.

The president discussed his coming interview with the Labor Department officials in Boston. The Board of Directors authorized payment to the president sufficient funds to cover his travel and expenses.

New applications which had been brought in by the directors were discussed, approved and turned over to the president.

Wilhelmina Edmonds, Secretary of the Board of Directors.

[fol. 316] Waiver of Notice of the Fourth Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine corporation, do hereby waive notice of the time and place of the fourth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the tenth day of October, 1957, at 2:00 o'clock in the afternoon as the time, and the residence of Mrs. Evelyn Whitaker as the place of the fourth meeting of the Board of Directors. The purpose of said meeting is to discuss the pending litigation which has been instituted against the Cooperative by the Secretary of Labor, Mitchell and to transact such other business as may come before the Board of Directors.

Dated this tenth day of October, 1957.

Ella Mae Banton, Fernande Loubier, Nettie M. Boyington, Audrey A. Leavitt, Wilhelmina C. Edmonds.

Minutes of the Fourth Meeting of the Board of Directors

The fourth meeting of the Board of Directors was held October 10, 1957 at 2:00 p.m. at the principal place of business of the Cooperative at Troy, Maine. All of the directors were in attendance. President Philip S. Bird and Treasurer and Secretary Evelyn Whitaker were also present.

[fol. 317] Mrs. Whitaker turned in her resignation as Treasurer, it was accepted and Mrs. Ella Banton was appointed to fill the vacancy.

President Bird addressed the directors and members, there being nineteen members present, gave a financial report of the Cooperative and discussed at length the "Complaint" brought against the Cooperative.

Members present at the fourth meeting were as follows:

Lillian Cook
Evelyn Bryant
Florence Walcott
Nina Goodwin
Hazel Rich
Alice Thibodeau
Matilda Ireland
Audrey Clark
Dora Fernald
Mary Waning
Fannie Johnson

Ella Hunt
Blanche Marston
Sadie Pelletier
Elsie Doucette
Evelyn Whitaker
Ella Banton
Nettie Boyington
Fernande Loubier
Audrey Leavitt
Wilhelmina Edmonds

The meeting was adjourned at 4:30.

Dated this tenth day of October, 1957.

Wilhelmina Edmonds, Secretary of the Board of Directors.

[fol. 318] Special Meeting of the Membership of Whitaker House Cooperative, Inc.

A special meeting of the Whitaker House Cooperative, Inc. was held October 26, 1957 at the Troy Grange Hall.

President Philip S. Bird, Treasurer Ella Banton, Secretary Evelyn Whitaker were in attendance. Four of the Directors were present. Members attending numbered forty-one.

President Philip S. Bird conducted the business meeting. Minutes of the last meeting were read and accepted.

Mrs. Ella Banton who had been appointed by the Board of Directors as Treasurer to fill the vacancy caused by the resignation of Evelyn Whitake was confirmed by the members.

President Bird gave a financial report of the Whitaker House Cooperative, Inc.

It was motioned and accepted by the members that all work delivered to the Whitaker House Cooperative, Inc. from the tenth to the twentieth of November inclusive should not be paid to the members until the nineteenth of December.

Members in attendance at this special meeting have signed the list following the minutes of this meeting.

Meeting adjourned at 5:00 p.m.

Welhelmina Edmonds, Secretary of the Board of Directors.

[fol. 319]

October 26, 1957.

Florence Soule
Dora Hawson
Susie Rideout
Ella Hunt
Lettie Hollis
Fannie Johnson
Lillian Cook
Fayline McDonald
Athene Mosher
Mrs. Hector Hallee
Fernande Loubier
Rachel Gendreau
Elsie Doucette
Sadie Pelletier
Nola Higgins
Clara Hamlin
Ella Banton
Audrey Leavitt
Andrey Clark
Mina Goodwin

Hope McLaughlin
Florence Walcott
Grace Butterfield
Blanch Marston
Matilda Ireland
Alice Thibodeau
Hazel Rich
Mrs. Wilbur Robinson
Esther Leavitt
Belle Stevenson
Tessie Chadbourne
Ethel Whitcomb
Marilyn Owen
Maggie Lutz
Margaret Tweedie
Alma Gerry
Evelyn Whitaker
Wilhelmina Edmonds
Dora Fernald
Gladys Whitecomb

I hereby certify that the above members attended a special meeting of Whitaker House Cooperative Inc. on Oct. 26, 1957 at Troy Grange Hall, Troy, Maine.

Wilhelmine C. Edmonds, Temp. Clerk.

[fol. 320] Waiver of Notice of the Fifth Meeting of the Board of Directors

We, the understand, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine corporation, do hereby waive notice of the time and place of the fifth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the twenty-first day of January, 1958 at 1:30 o'clock in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the fifth meeting of the Board of Directors. The purpose of said meeting is to consider applying for a bank loan, review first six months business and to transact such other business as may come before the Board of Directors.

Dated this twenty-first day of January, 1958.

Audrey Leavitt, Wilhelmine C. Edmonds, Fernande Loubier, Ella Mae Banton.

[fol. 321] Minutes of the Fifth Meeting of the Board of Directors

The fifth meeting of the Board of Directors was held at the principal place of business at Troy, Maine on January 21, 1958. Officers in attendance were:

President, Philip S. Bird.

Secretary, Evelyn Whitaker.

Treasurer, Ella Banton.

Directors, Ella Banton, Chairman, Audrey Leavitt, Fernande Loubier, Wilhelmine Edmonds.

It was moved and seconded that the following names be dropped from the membership roll because of substandard work: Mildred Drake, Gladys Drew, and Sadie Perkins. At the time of notification the membership fee shall be returned. Motion carried by a vote of 4 to 0.

It was moved and seconded that the President be authorized to make application for a bank loan up to five thousand dollars (\$5000) and to offer the Whitaker House Co-operative, Inc. inventory as collateral security for the loan, along with a 100% insurance coverage on the inventory to be payable to the bank in case of loss. Motion was carried by a vote of 4 to 0.

Motion was made and seconded that the President be authorized to make application from The Small Business Administration for the same amount and the same conditions as in the previous motion. The motion was carried by a vote of 4 to 0.

Meeting was adjourned at 4:15 p.m.

Wilhelmine Edmonds, Secretary of the Board Directors.

[fol. 322] Waiver of Notice of the Sixth Meeting of the
Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Co-operative, Inc., a Maine corporation, do hereby waive notice of the time and place of the sixth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the sixth day of March, 1958 at 2:00 o'clock in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the sixth meeting of the Board of Directors. The purpose of said meeting is to discuss the matter of obtaining a bank loan and such other business as may come before the Board of Directors.

Dated this sixth day of March, 1958.

Audrey Leavitt, Wilhelmine Edmonds, Ella Mae
Banton.

Minutes of the Sixth Meeting of the Board of Directors

The sixth meeting of the Board of Directors was held at the principal place of business at Troy, Maine on March 6, 1958 at 2:00 p.m. Officers in attendance were:

President, Philip S. Bird
Secretary, Evelyn M. Whitaker
Treasurer, Ella Banton
Directors, Ella Banton, Chairman, Audrey Leavitt,
Wilhelmine Edmonds

[fol. 323] The President reported that the application loan authorized by the Directors at the fifth meeting has been denied.

Mrs. Leavitt moved that the Board of Directors authorize the President to make application for a bank loan of up to \$5,000 and that the loan be secured by the personal endorsement of the directors present and such other directors as may sign the note together with the endorsement of Vice-President John Kennedy. Motion seconded by Mrs. Edmonds. Motion carried by vote of three to nothing.

It was moved and seconded that members receive no advance allowances for items submitted to the Cooperative for sale until such time as the items submitted have been sold with the exception of those items which are needed to fill orders on hand. The purpose of this motion is to stop any further additions to inventory until such time as the Board of Directors may authorize such additions to inventory. Motion carried three to nothing.

The Board of Directors instructed the President to communicate with Mrs. Law and to express their concern over the lack of orders and to request every effort be made to sell the sacque sets.

Meeting was adjourned at 5:20 p.m.

Wilhelmine Edmonds, Secretary to the Board.

[fol. 324] Waiver of Notice of the Seventh Meeting of the
Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine Corporation, do hereby waive notice of the time and place of the seventh meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the tenth day of April, 1958 at 1:30 o'clock in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the seventh meeting of the Board of Directors. The purpose of said meeting is to establish a loan repayment program and such other business as may come before the Board of Directors.

Dated this tenth day of April, 1958.

Ella Mae Bantzen, Fernande Loubier, Wilhelmine Edmonds, Audrey Leavitt.

Minutes of the Seventh Meeting of the Board of Directors

The seventh meeting of the Board of Directors was held at the principal place of business at Troy, Maine at 1:30 p.m. on April 10, 1958. Officers in attendance were:

President, Philip S. Bird

Treasurer, Ella Banton

Secretary, Evelyn Whitaker

Directors, Ella Banton, Wilhelmine Edmonds, Fernande Loubier, Audrey Leavitt

[fol. 325] Mrs. Leavitt moved that a loan repayment fund be maintained in the Cooperative checking account in an amount sufficient to make five monthly payments on the five thousand (\$5,000) dollar note now due the Federal Trust Company. Motion was seconded by Mrs. Edmonds. Motion carried by a vote of 4 to 0.

A motion was made by Mrs. Loubier that the Cooperative make an effort to establish a lower price line which would be untrimmed, unboxed and sold in the \$32.00 to \$36.00 price range and that Mrs. Whitaker investigate the sales potentiality of articles in this price range before any attempt is made to sell this price line. Motion was seconded by Mrs. Leavitt. Motion carried by a vote of 4 to 0.

A motion was made by Mrs. Edmonds that the Cooperative inform the members that samples for items to be sold in the fall should be submitted before the 1st of May.

Motion seconded by Mrs. Loubier. Motion carried by a vote of 4 to 0. Meeting was adjourned at 4:45 p.m.

Wilhelmine C. Edmonds, Secretary to the Board.

[fols. 326-331] Waiver of Notice of the Eighth Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine Corporation, do hereby waive notice of the time and place of the eighth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the fifteenth day of May, 1958 at 1:30 o'clock in the afternoon as the time and the residence of

Mrs. Evelyn Whitaker as the place of the eighth meeting of the Board of Directors. The purpose of said meeting is discuss the annual membership meeting which should be held in June and preparation of an agenda for that meeting and such other business as may come before the Board of Directors.

Dated this fifteenth day of May, 1958.

Ella Mae Banton, Wilhelmine C. Edmonds, Audrey A. Leavitt, Fernande Loubier.

Minutes of the Eighth Meeting of the Board of Directors

The eighth meeting of the Board of Directors was held at its main place of business at Troy, Maine, on May 15, 1958.

The meeting was called to order by the chairman of the Board, Ella Banton. Officers in attendance were:

[fol. 332] Philip S. Bird, President

Ella M. Banton, Treasurer

Evelyn Whitaker, Secretary

Directors present were:

Ella Banton, Chairman

Fernande Loubier

Audrey Leavitt

Wilhelmine Edmonds

Mrs. Leavitt moved that the president, acting in his capacity, as attorney for the Cooperative confer with the presiding justice in an attempt to have the case pending against the Cooperative continued to the next term of the Federal District Court in Bangor.

Motion was seconded by Mrs. Edmonds. Carried by a vote of four to nothing.

It was moved by Mrs. Loubier that if an extension of the case pending was not granted that a special meeting of all members be held on June 4th at the Pilot's Grill in Bangor, Maine at 10:00 a.m. The agenda for the meeting would be the same as the annual meeting. If the extension of the case is granted the annual meeting is to be held at the Pilot's Grill in Bangor on June 26, 1958 at 10:00 a.m.

The purpose of the meeting either special or annual: To elect officers, to discuss pending case, President, Treasurer and Secretary's reports and the report of the Board of Directors. Seconded by Mrs. Leavitt. Carried by a vote of four to nothing.

A unanimous vote of the Directors present directed President Bird to draft amendments to Article 7, Section 5, Article 13, Section 3 of the by-laws of the Whitaker House Cooperative, Inc.

A motion was made by Mrs. Loubier that partial payments be advanced to each member in a percentage basis; these payments are to be made only if there is sufficient money in the Cooperative account over and above the note fund.

[fols. 333-336] It was seconded by Mrs. Leavitt. It was carried by a vote of four to nothing.

President Bird was instructed to mail out notices to all members of the meeting to be held at the Pilot's Grill.

Meeting adjourned at 4:30 p.m.

Wilhelmine Edmonds, Secretary of the Board of Directors.

[fol. 337] Waiver of Notice of the Ninth Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine Corporation, do hereby waive notice of the time and place of the ninth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the twelfth day of June, 1958 at 1:30 o'clock in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the ninth meeting of the Board of Directors. The purpose of said meeting is to discuss any matters that reasonably may come to the attention of the Directors.

Dated this twelfth day of June, 1958.

Ella Mae Banton, Fernande Loubier, Audrey Leavitt,
Wilhelmine Edmonds.

Minutes of the Ninth Meeting of the Board of Directors

The ninth meeting of the Board of Directors was held at its main place of business at Troy, Maine on June 12, 1958.

The meeting was called to order by Mrs. Banton, Chairman of the Directors.

Officers present were:

Philip S. Bird, President
Evelyn Whitaker, Secretary
Ella Mae Banton, Treasurer

[fol. 338] Directors present were:

Ella Mae Banton, Chairman
Fernande Loubier
Audrey Leavitt
Wilhelmine Edmonds

Mr. Jacobs, auditor for Whitaker House Cooperative, Inc., with President Bird discussed the financial status of the Cooperative.

New styles in sports sets of caps and mittens were displayed and modeled by Susanna Jacobs. Ideas were offered by the various officers present as to methods of placing these on the market.

President Bird contacted the Pilot's Grill in Bangor for reservations for the annual membership meeting on the twenty-sixth of June. Mrs. Whitaker was instructed to complete arrangements for that date and President Bird to mail out notices to all members.

Meeting adjourned at 4:45 p.m.

Wilhelmine Edmonds, Secretary of the Board of Directors.

[fol. 339] Waiver of Notice of the First Annual Meeting of Whitaker House Cooperative, Inc.

I, the undersigned, being a member of the Whitaker House Cooperative Inc., a Main Corporation, do hereby waive notice of the time and place of the first annual meeting of the membership of the Whitaker House Cooperative.

Inc. which is to be held at the Pilot's Grill in Bangor, Maine at 10:30 a.m. on June 26, 1958.

I further waive the requirements of Article 7, Section 5 of the by-laws requiring fifty-one per cent of the membership to constitute a quorum.

Date June —, 1958.

[fol. 340]. Annual Meeting of the Stockholders
June 26, 1958.

The annual meeting of the stockholders of Whitaker House Cooperative, Inc. was held at the Pilot's Grill, Bangor, Thursday, June 26, 1958.

In the absence of the President, Philip S. Bird, Esq., the meeting was called to order by the Vice-President, Mr. John P. Kennedy.

The number of members present was thirty-seven. Also present were Burton G. Shiro, Esq., Attorney, Waterville, as parliamentary counsel; Francis W. Jacobs, Esq., Tax Counsel and Auditor for the Cooperative; Mrs. Janice M. Overlock, Winslow, as Assistant to the Secretary. The Vice President and Mr. Shiro examined proxies and declared them sufficient for the transaction of business.

The Secretary's report of the annual meeting June 9, 1957 was read and accepted.

By unanimous consent, presentation of the Treasurer's report was set for the afternoon session.

Mrs. Evelyn Whitaker, Business Manager of the Cooperative, at the request of the Vice-President gave a detailed account of general business procedures.

Mr. Shiro, speaking at the request of Mr. Bird, discussed the Government action against the Cooperative, consisting of a claim by the Government that the members are employees and should be paid \$1 an hour under the Federal Law. He expressed the opinion that the matter will be settled some time in September by the Federal Court in Portland; also that the members are independent contractors and not employees.

The Vice-President then called for discussion and questions. It was asked what was going to be done with orders sent in and not sold. It was suggested that the secretary or directors should notify members if they should stop making goods. Mrs. Whitaker said that stock should be

kept down after November 30th as there are then not many [fol. 341] orders until after the first of the year.

Mrs. Whitaker spoke of the sales facilities of the Cooperative through Mr. and Mrs. Law and their sales force.

The meeting recessed for lunch at noon.

The meeting reopened at 1:15. At the request of the Treasurer, Mr. Jacob gave the Financial Statement of the Cooperative.

Mr. Jacob made three recommendations, upon which action was taken as follows:

- 1) A recommendation that there be annual membership dues of three dollars; upon motion, it was so voted.
- 2) That a cash reserve be built up and maintained by withholding some proportion, such as 40% of the amounts due members, during the next few months; records being kept of the unpaid balances in members' favor, to be paid off when the Cooperative's cash position is more liquid. Upon motion, this recommendation was tabled.
- 3) That payments be sent to members on a set date at fixed periods. Upon motion it was voted that payments be sent every two months.

After discussion upon motion it was voted that Article 13, Section 3 of the By-Laws be amended by striking the last sentence of the Section.

After discussion, upon motion it was voted that Article 7, Section 5 be amended so that twenty-five members constitute a quorum.

Upon motion the meeting preceded to nomination and election of officers.

The Vice-President designated a nominating committee as follows:

Marilyn Owen
Margaret Tweedie
Athine Mosher

Officers nominated were:

Philip S. Bird, President
John P. Kennedy, Vice President

Wilhelmine Edmonds, Secretary
 Ella Mae Banton, Treasurer
 Francis W. Jacob, Clerk

Directors nominated were:

Wilhelmine Edmonds
 Ella Mae Banton
 Maggie Lutz
 Audrey Leavitt
 Matilda Ireland

[fol. 342] Maggie Lutz declined and Margaret Tweedie was nominated; she also declined. Mrs. Ola Miller was nominated and accepted.

Upon motion, it was voted that the secretary cast a single ballot for the entire slate of officers and directors; this was done and they were declared elected. On recommendation of the Directors, Mrs. Evelyn Whitaker was continued as manager on approval of the meeting by acclamation.

Mr. Jacob was duly sworn as Clerk by Burton Shiro, Esq. Upon motion, the meeting was adjourned.

Wilhelmine Edmonds, Secretary of the Board of Directors.

[fol. 343] Waiver of Notice of the Tenth Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Co-operative, Inc., a Maine corporation, do hereby waive notice of the time and place of the tenth meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the twenty-third day of July, 1958 at 1:30 o'clock in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the tenth meeting of the Board of Directors. The purpose of said meeting is to discuss anything that may reasonably come to the attention of the Board of Directors.

Dated this twenty-third day of July, 1958.

Ella Mae Banton, Audry Leavitt, Wilhelmine C.
 Edmonds, Matilda Ireland

[fol. 344]

July 23rd.

Minutes of 10 Meeting of Whitaker House
Cooperative Inc.

The 10 meeting of the Whitaker House Cooperative Inc. was held at its main place of business at Troy, Maine, at 1.30 p.m., July 23rd, 1958.

Officers present were:

Pres. Phillip S. Bird
Vice Pres. Jack Kennedy
Treasurer Ella Banton
Sect'y Wilhelmine Edmonds

Directors in attendance were:

Ella Banton
Audrey Leavitt
Wilhelmine Edmonds
Matilda Ireland

Members in attendance were:

Mrs. Florence Walcott
Mrs. Hazel Rich
Mrs. Blanche Marston
Mrs. Ethel Thornton.

A motion was made and carried by the directors present, that Pres. Bird serve as temporary clerk and upon motion [fol. 345] duly made and seconded, the following offices of directors were appointed: Ella Banton, Chairman, Wilhelmine Edmonds Sect'y.

After the officers of the Board of Directors was duly elected the Chairman Mrs. Banton, opened the Business Meeting.

Due to an error, at the annual meeting, Wilhelmine Edmonds was elected to serve as sect'y. to the officers of the cooperative.

Mrs. Edmonds tendered her resignation, to take effect immediately. It was accepted and Evelyn Whitaker was duly elected, by a vote of four to nothing, to serve in that capacity.

The financial status of the Cooperative was discussed.

Pres. Bird recommended, to the board, that payments to members be made, according to the dates of materials submitted for sale that the oldest accounts be paid first. [fol. 346] He also recommended that the 50% balance due to the members prior to the June 12th meeting be paid before any others.

It was voted upon and carried by a vote of four to nothing.

Pres. Bird was instructed to make up a form letter to send out to members returning membership certificates.

Pres. Bird called for a Directors Meeting to be held on August 13th, at Windermere Park at the cottage of Evelyn Whitaker.

This meeting open to all members—meeting called for 2 o'clock. Lunch at 12 o'clock, members present having the opportunity of taking advantage of the chicken barbecue sponsored by the American Legion, on that date.

As there was no further business, motion was made and [fols. 347-348] seconded that the meeting be adjourned at 3:15 p.m.

Wilhelmine Edmonds, Sect'y.

[fol. 349] Waiver of Notice of the Eleventh Meeting of the Board of Directors

We, the undersigned, being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine corporation, do hereby waive notice to the time and place of the eleventh meeting of the Board of Directors, and of the business to be transacted at said meeting.

We designate the sixteenth day of August, 1958, at 2:00 o'clock in the afternoon as the time and the camp of Mrs. Evelyn Whitaker as the place of the eleventh meeting of the Board of Directors. The purpose of said meeting is to discuss anything that may reasonably come to the attention of the Board of Directors.

Dated this sixteenth day of August, 1958.

Matilda Ireland, Ola N. Miller, Audrey Leavitt,
Wilhelmine C. Edmonds, Ella Mae Banton.

[fols. 350-353] Minutes of the Eleventh Meeting of the
Board of Directors

The eleventh meeting of the Whitaker House Cooperative, Inc. was held on August 16, 1958 at the Cottage of Evelyn Whitaker at Windemere Park at 2:15 p.m.

Officers in attendance were:

President Philip S. Bird
Treasurer Ella Banton
Secretary Evelyn Whitaker

Directors present were:

Ella Banton, Chairman
Audrey Leavitt
Ola Miller
Matilda Ireland
Wilhelmine Edmonds

Members attending were thirty-two.

Ella Banton chairman of the Board of Directors opened the business meeting.

Minutes of the tenth meeting were read and accepted.

Old business discussed. Return of membership fees.

By the by-laws of the Cooperative only one of those requesting return of membership fees returned was eligible.

New Business. Board of Directors directed the manager and president to devise some system of maintaining a stock control and report their recommendations to the Board of Directors at their next meeting. President Bird discussed the pending preliminary hearing and trial of Whitaker House Cooperative, Inc. and an open discussion was held by the members present.

President Bird called for a meeting of Directors for September 11th at its main place of business. A rising vote of thanks was extended to Mrs. Whitaker for her kind hospitality. There being no further business a motion was made and seconded that the meeting be adjourned. Time 3:45 p.m.

Wilhelmine Edmonds, Secretary of the Board of
Directors.

[fol. 354] Waiver of Notice of the Twelfth Meeting of the
Board of Directors

We, the undersigned being the majority of the Board of Directors elected by the members of Whitaker House Cooperative, Inc., a Maine Corporation, do hereby waive notice of the time and place of the twelfth meeting of the Board of Directors and of the business to be transacted at said meeting.

We designate the eleventh day of September, 1958, at 1:30 p.m. in the afternoon as the time and the residence of Mrs. Evelyn Whitaker as the place of the twelfth meeting of the Board of Directors. The purpose of said meeting is to discuss anything that may reasonably come to the attention of the Board of Directors.

Dated this eleventh day of September, 1958.

Ella Mae Banton, Wilhelmine Edmonds, Ola N. Miller, Matilda Ireland, Audrey Leavitt.

[fol. 355] Minutes of the Twelfth Meeting of Whitaker
House Cooperative, Inc.:

The twelfth meeting of the Board of Directors of Whitaker House Cooperative, Inc. was held on September 11, 1958 at its main place of business at Troy, Maine at 2:00 p.m.

Officers in attendance were:

President Philip S. Bird
Vice President Jack Kennedy
Treasurer Ella Banton
Secretary Evelyn Whitaker

Directors present were:

Ella Banton, Chairman
Audrey Leavitt
Matilda Ireland
Ola Miller
Wilhelmine Edmonds

Mr. Jacob auditor of Whitaker House was present.

Members attending numbered thirty. Ella Banton, Chairman called the meeting to order. Minutes of the last meet-

ing were read and accepted. Mr. Jacob, auditor, gave a report of the Cooperative from June 25th to September 4th and it has been duly filed with the minutes of the twelfth meeting.

New Business: A motion was made to enter into the minutes the confirmation of the oral agreement made by the directors with the President Philip S. Bird to pay him \$50.00 per week for salary, such salary to be in lieu of any and all compensation for professional services. Motion was accepted and carried by a vote of five to nothing.

A motion was made to enter into the minutes the confirmation of the oral agreement made by the directors with the manager, Evelyn Whitaker to pay her \$55.00 per week salary, such salary to be in lieu of any and all compensation for services.

[fol. 356] Motion was accepted and carried by a vote of five to nothing. President Bird discussed the pending trial at Bangor of Whitaker House Cooperative, Inc.

There being no further business it was moved and seconded that the meeting be adjourned. It was adjourned at 5:15 p.m.

—, —, Secretary for the Board of Directors.

[fol. 357]

Sept. 11th 1958

Members in attendance at the 12th Meeting of the Board of Directors

Whitaker House Cooperative Inc.

Mrs. Florence Howe	Mina Goodwin
Mrs. Olive L. Hitchcock	Tessie Chadbourne
Margaret Brown	Ethel D. Whitcomb
Inez J. Whitten	Dora G. Hanson
Ella C. Hunt	Maggie T. Lutz
Fannie Johnson	Florence Walcott
Marilyn Owen	Matilda Ireland
Lena McGinnis	Grace M. Butterfield
Fernande Loubier	Evelyn Bryant
Alexia Busque	Clara Hamlin
Elsie Doucette	Ethel E. Thornton
Audrey Leavitt	Madge Perry
Ola N. Miller	Evelyn M. Whitaker
Alma Gerry	Mae Banton
Dora Fernald	Wilhelmina Edmonds

[fol. 358]

DEFENDANTS' EXHIBIT #3

Tel. Dixmont 123-21

Whitaker House Cooperative, Inc.

Hand Made Originals, Booties, Moccasins, Sweater Sets
Sacques, Bonnets

Troy, Maine

3 Piece Baby Sets

Price Per Doz

3000 Nylon or Wool Lace Trim	69 00
7000 Wool Pocket Style	54 00
2660 Wool Puff Stitch	54 00
225 Wool Daisy Set	69 00
125 Wool Poodle	69 00
4000 Peplum Style	54 00
8000K Boy or Girl Knit Cross Button	60 00
9000K Girls Knit	69 00
1300 Rosebud Trim	54 00
1200 Shell Boy or Girl	54 00
292 Nylon Front Button	69 00

Booties

90 Nylon Lace Trim	12 75
18N Nylon Pom Pom	12 75
3 Nylon Tailored	12 75
19N Nylon Rosebud Tailored	12 75
35 Nylon Pom Pom	12 75
225 Daisy Style	12 75
40 Nylon Tailored Style	12 75
2X Wool Tailored Style	12 75
11W Wool Pom Pom	12 00
15 Setli Poodle	12 75
544 Nylon Angora Trim	12 75
150 Nylon Angora Trim	15 00
600 Nylon Knit	15 00
60 Nylon Stretch	15 00
4 Christening Lace Trim	15 00
70 Nylon Sock Type	15 00
21 Rabbit Style	15 00
125 Wool or Nylon Poodle	15 00
2660 Wool Puff Bootie	8 75
500 Wool Bootie	7 50

Caps

1510 Wool Layette Bonnet	13 75
544 Nylon Helmet Layette	15 00

[fol. 359] DEFENDANTS' EXHIBIT #4

Bird & Bird
Attorneys and Counselors

152 Main Street
Waterville, Maine

Stanley L. Bird
Philip S. Bird

June 28, 1957.

Dear:

You have indicated by sending your subscription fee to this office that you are interested in establishing an organization which will enable you and many others like you to continue your home work business and which will enable you to have a ready market for the products which people such as you make in your own homes. The purpose of this letter is to briefly outline the method by which such an organization is established and operated. In the course of this letter I am making these basic assumptions. The first is that you want to continue to make products in your home and that you are interested in receiving as much pay for them as possible.

In the past whenever a group of individuals has been confronted with a situation whereby they could not as individuals do certain things for themselves as well as they could as a group, they have, in thousands of cases, organized what is known as a *Cooperative*. No two co-operatives are alike and no single definition of the term is sufficient to cover all the various forms of organizations which use the term cooperative to signify their form of organization.

Generally speaking a cooperative consists of a group of individuals who have established an organization to promote the economic welfare of each individual who is a member. Each individual member has rights equal to that of every other member. This is a point which is different from that of a corporation where the individual owners do not have equal rights because one stockholder may own fifty thousand shares and thus be entitled to fifty thousand votes whereas another stockholder may own only one share of stock and be entitled to only one vote. In a co-

operative everyone is on an equal basis. Thus a cooperative is a very democratic type of organization.

There are several thousand cooperatives presently existing in the United States. You may be familiar with some yourself. Most of the cooperatives are to be found in the agricultural field. Many of these were organized back in the 1920's when the prices of farm products were such at a low level that farmers in different areas got together and organized cooperatives to promote a better system of marketing their products. The most common types of cooperatives are Consumers' Cooperatives, Marketing Cooperatives, Business Purchasing Cooperatives, Workers' Productive Societies, Financial Cooperatives, Insurance Cooperatives, Labor Unions, and Trade Associations.

A cooperative of home workers here in Maine would benefit the home workers in the following ways:

1. It would enable them to comply with the Federal Laws concerning wage and hour regulations.

2. It would enable them to purchase supplies at wholesale prices.

[fol. 360] 3. It would enable them to market their products more readily.

4. It would increase the uniformity of products.

5. As a going organization they would be able to exert more influence in matters affecting their economical welfare.

6. It would enable them to take advantage of other economic opportunities which as a group they could obtain at reduced costs, such as hospitalization, life insurance, etc.

A cooperative is organized by first having a meeting of the people who are interested in setting up the cooperative. At this meeting they organize themselves into an association for the purpose of establishing a cooperative. They decide what the purposes of the cooperative will be, what the rules and regulations will be concerning membership and the operation of the cooperative, the election of a

board of directors and officers, signing of the incorporation papers, and planning for an over all business policy for the coming year. In order to accomplish all these activities in one day and to avoid too much travel expense on the part of the different members, I would suggest that the meeting start at about 10 o'clock in the morning and adjourn about 4 o'clock in the afternoon. I would be present in order to lend you whatever assistance might be necessary as far as the technical side of the organization might be concerned and open the meeting by describing in more detail what a cooperative is and what it can do for the members.

A meeting of all the home workers who are interested in establishing a cooperative will be held on July 9, 1957, at the Jefferson Hotel in Waterville, Maine, commencing at 10:00 in the morning. Luncheon will be served at a cost of \$1.50 per person plus gratuities. If you are able to attend this meeting, please let me know in order that I may inform the hotel how many people they may expect to serve.

There is every reason to believe that people such as yourselves could make a cooperative work successfully. As a matter of fact, I believe that this is the only way in which you can expect to reach a large market and to obtain the maximum amount of economical benefit from the work which you perform in your own homes.

Very truly yours, Bird & Bird, By —, —.

PSB:me

[fol. 361]

DEFENDANTS' EXHIBIT #6

Whitaker House Cooperative, Inc.

Statement of Liabilities and Assets September 4, 1958

Liabilities

Balances of pay due employees	558	
Federal Trust, principal and interest due September 1	227	
Payroll taxes withheld and accrued to date (payable in October, together with later withholdings and accruals to Sept. 30)	148	
Maine Employment Security accrual to date (payable October, with later Sept. accruals)	26	
Current and prior		959
Commission now due Mrs. Law*	2,556	
Balance due F. W. Jacob, services*	242	
Balance due Atkins, typewriter purchase	92	
Current, external		2,884
Evelyn Whitaker: Arrears due for services	1,749	
Owing her for merchandise	6,159	
Owing to Evelyn Whitaker	7,908	
Philip S. Bird, President: salary unpaid	1,200	
Current, internal		9,108
Federal Trust note, future payments: principal	3,750	
(After September) interest	168	
		3,918
Mrs. Law, commissions due on collection		1,049
Balances due members on merchandise		3,991
		21,909
Anticipated interest included		168
Total liabilities		21,741

* A payment of \$500 to Mrs. Law immediately after September 4th is taken into consideration, here, and in the Cash account in the Assets schedule. F. W. J. account includes services on September 4th; does not include later services.

[fol. 362] Whitaker House Cooperative, Inc.

Statement of Liabilities and Assets, September 4, 1958

Assets

Cash in bank and petty cash*	915
Accounts receivable regarded as good	5,289
Accounts receivable regarded as doubtful	147
Merchandise inventory**	10,024
Operating supplies inventory**	514
Prepaid insurance	185
Typewriter, carried at cost	130

Total assets 17,204

Statement of Deficit

Total Liabilities	21,741
Total Assets	17,204

Deficit 4,537

As appears also as loss in the Profit and Loss Statement.

* The cash balance stated takes into account a payment of \$500 to Mrs. Law immediately after September 4th; in the preceding Liabilities schedule, the amount which was due her on that date is reduced by a similar amount, as noted below that Schedule.

Cash receipts during September 4th audit are not taken into consideration; since these were entirely from Accounts Receivable, the total Assets balance is not affected by whether or not they are entered as Cash.

** Inventory by physical count and extension was not taken at this time. Inventories stated were arrived at by the same method of computation which has been used previously, and which has uniformly proved satisfactorily accurate.

[fol. 363] Whitaker House Cooperative, Inc.

Profit and Loss Statement, opening of business to September 4, 1958

Gross profit 14,637

Evelyn M. Whitaker, salary 3,190

Doris Law, commissions: full earned 7,550

Contingent 1,049

8,599

Taxes 339

Interest 199

Insurance 334

Services not payroll: P. S. Bird 2,950

F. W. Jacob 774

Printing (regular course of business) 526

Office expense 226

Operating supplies 1,349

Tavel expense, Evelyn Whitaker 94

Bank service charges 61

18,641

Organization costs:

Attorney's fees 150

Filing fees 35

Printing 348

533

Total costs: 19,174

Net Loss: 4,537

19,174

[fol. 364] WHITAKER HOUSE COOPERATIVE, INC.

Statement of Gross Profit, opening of business to September 4, 1958

Total Sales		45,618
Less—Returns	144	
Discounts taken	781	925
Net Sales		44,693
Opening inventory	7,110	
Merchandise from members	27,897	
Merchandise from outside mercantile suppliers	1,194	
Total merchandise cost	29,091	
Labor at Troy on merchandise	3,766	
Inward carriage	113	
	40,080	
Closing inventory	10,024	
Cost of Goods Sold		30,056
Gross Profit		14,637

[fols. 365-366] Whitaker House Cooperative, Inc.

Comparative Analysis of Deficit

Deficit September 4, 1958	4,537
Deficit stated June 25, 1958	3,163
Apparent increase in deficit, ten weeks	1,374

Memorandum: in the June 25th statement, for reasons given at the September 11th meeting of the Directors, the amount entered for services of Philip S. Bird was the \$1,535 which he had then been paid. On the basis of the minute entered at the recent meeting, that figure, as of June 25th, is to be revised to \$2,450, and the then deficit increased by the difference of \$915. The revised comparative figures are then:

Deficit September 4, 1958	4,537
Deficit June 25, 1958	4,078
Actual increase in deficit	459

Analysis of Increase in Deficit, June 25–September 4, 1958

Increase in gross profit	2,621
Doris Law, commissions entered	1,689
Evelyn Whitaker, salary	550
Philip Bird, salary	500
F. W. Jacob, services	114
Taxes, interest, and insurance	167
Office expense	48
Supply expense	12
Costs	3,080
Increase in deficit	459
	3,080

[fol. 367] UNITED STATES DISTRICT COURT, DISTRICT OF
MAINE, NORTHERN DIVISION

Civil No. 1050

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR

VS.

WHITAKER HOUSE COOPERATIVE, INC., PHILIP S. BIRD, President,
EVELYN M. WHITAKER, Treasurer and General Manager,
and EVELYN M. WHITAKER, individually

OPINION AND ORDER—February 13, 1959

Gignoux, J.

This is an action brought by the Secretary of Labor under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. § 201 et seq., to enjoin the defendants from violating the provisions of the Act. Jurisdiction is conferred by section 17 of the Act. 29 U.S.C.A. § 217.

The complaint, filed September 30, 1957, alleges that since July 18, 1957 defendant Whitaker House Cooperative, Inc., defendant Bird as President of the Cooperative, and defendant Whitaker as Treasurer and General Manager of the Cooperative, have violated the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act by paying wages to approximately 100 women (hereinafter descriptively called homeworkers) producing infants' knitted and crocheted outerwear which is sold by the defendant Cooperative in interstate commerce, at rates less than the [fol. 368] minimum wage rates established by Section 6 of the Act; and by failing to keep certain records, and to obtain special homework certificates with respect to such homeworkers as required by the regulations issued by the Administrator of the Wage and Hour Division, Department of Labor, under Sections 11(c) and 11(d) of the Act.¹

¹ The records required under authority of Section 11(c) of the Act are prescribed in Regulations, Part 516, Subparts A and B, 29 CFR §§ 516.1-516.24.

The pertinent regulations issued by the Administrator under authority of Section 11(d) of the Act are Part 617, *Employment of Homeworkers in the Knitted Outerwear Industry*, 29 CFR §§ 617.1-617.12.

The complaint also alleges similar violations of the Act by Mrs. Whitaker, individually, from September, 1954 through July 17, 1957. However, at the conclusion of plaintiff's evidence the parties filed a stipulation of dismissal of the action against Mrs. Whitaker individually and in her capacity as Treasurer of the defendant Cooperative. There thus remain for consideration only the charges against the defendant Cooperative and the individual defendants in their respective capacities as President and General Manager of the Cooperative.

At a pre-trial conference on February 4, 1958, it was conceded by the defendants that the homeworkers herein involved are engaged in the production of goods for interstate commerce and that, with respect to these homework- [fol. 369] ers, the defendants have violated the minimum wage, record-keeping and homework certificate provisions of the Act, if the Act is applicable. It was further stipulated by the parties that the only issue for determination by this Court is whether or not the homeworkers, all of whom are members of the defendant Cooperative, are "employees" of the defendants within the meaning of the Act. Defendants agree that if these homeworkers are "employees," defendants have violated the Act and the injunction should issue.

Evidence upon the issue as thus limited was heard by the Court on September 23, 24 and 25, 1958. Briefs were submitted by the parties on December 1, 1958, and reply briefs were filed on December 15, 1958. At the request of the parties, the Court heard oral argument on December 30, 1958, and the parties were provided until January 19, 1959 for the filing of additional materials requested by the Court relating to the legislative history of the Fair Labor Standards Act.

As indicated, the issue for determination by this Court is whether the homemaker-members of the Cooperative are "employees" of the defendants within the meaning of the Fair Labor Standards Act. Plaintiff's position is that the homemaker-members are covered by the Act, on two grounds. First, plaintiff contends that the Cooperative is not a *bona fide* cooperative controlled by its members; that, in reality, the individual defendants control the Cooperative and its business; and that hence an employment

relationship exists between the homeworke~~r~~-member and [fol. 370] the defendants, and the Act applies, under the rule of *Fleming v. Palmer*, 123 F. 2d 749 (1st Cir. 1941), *cert. denied, sub nom., Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942). See also *McComb v. Homeworkers Handicraft Cooperative*, 176 F. 2d 633 (4th Cir. 1949), *cert. denied*, 338 U.S. 900 (1949). Plaintiff further contends that even if the Cooperative is a *bona fide* cooperative controlled by its members, still the Act applies to a member-controlled cooperative. Defendants take the position that the Cooperative is, in fact, a *bona fide* cooperative organized and controlled by its members for their own benefit, and that the Act does not apply to the relationship between such a cooperative and its members.

The first issue thus presented is one of fact and requires an examination of the background, organization and present operation of the Cooperative. The evidence in this respect establishes the following history:

Mrs. Whitaker has lived in Troy, Maine for approximately forty-seven years. About twenty-five years ago, she first became engaged in the business of buying hand-made infants' knitted and crocheted outerwear for various out-of-state concerns.² The articles handled by her at that time were obtained from approximately 100 ladies in the vicinity of Troy, who either knitted or crocheted [fol. 371] the garments as part-time work in their homes. Mrs. Whitaker furnished the yarn. About fifteen years ago Mrs. Whitaker ceased doing business and transferred her yarn business to Mrs. Pearl L. Nutter, a neighbor in Troy.³ Approximately five years ago Mrs. Whitaker re-entered the business, and from September, 1954 to July 17, 1957 she was engaged, as before, in purchasing, handling and selling infants' knitted and crocheted outerwear

² Newport Knitting Co., Babykuit, and Edward S. Wagner Co. See *McComb v. Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y. 1950), *reversed on other grounds, sub nom., Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (2d Cir. 1951), and *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303 (2d Cir. 1954), *cert. den.*, 348 U.S. 964 (1955).

³ See *Mitchell v. Nutter*, 161 F. Supp. 799 (D.C. Me. 1958).

from her home in Troy. During this period 163 ladies furnished articles to Mrs. Whitaker. All of these ladies did their work during their spare time in their homes. At her home in Troy, Mrs. Whitaker employed one helper to add ribbon or embroidery to the garments received by her from the homeworkers, and to assemble the garments in sets. Mrs. Whitaker packaged the garments and shipped them to her retail outlets. She maintained an inventory of goods, which varied in amount from season to season, and kept complete books and records. She did not employ a broker to sell the garments, nor did she furnish the yarn, which the homeworkers obtained from other sources. She set the price which she paid for the finished garments on a piece-rate basis. The finished garments were either mailed or delivered to her residence, and payment was by check. In short, the relationship between Mrs. Whitaker and these homeworkers was substantially identical to that between Mrs. Nutter and her homeworkers, which [fol. 372] this Court described at length, and held to be an employment relationship within the Fair Labor Standards Act, in *Mitchell v. Nutter*, 161 F. Supp. 799 (D.C. Me. 1958). There can be no question that if Mrs. Whitaker were presently operating as previously, her operations would fall within the scope of *Nutter*, and an injunction should issue.

In January, 1957, following a compliance investigation by the Wage and Hour Division of the Department of Labor, Mrs. Whitaker, through her attorney, Mr. Bird, was formally advised by the Regional Attorney of the Wage and Hour Division that the homeworkers were her employees within the meaning of the Fair Labor Standards Act, and that if she wished to continue her business in the manner in which she was then operating, it would be necessary for her to comply with the minimum wage and record-keeping provisions of the Act. Various conferences were thereafter held among Mrs. Whitaker, Mr. Bird and the Wage and Hour Division Investigator, both at Mrs. Whitaker's home in Troy and at Mr. Bird's office in Waterville, Maine, for the purpose of determining the steps which could be taken to insure compliance with the Act. At these conferences the possibility of the organization of a cooperative was discussed, and it was suggested that the Act would not apply if the business were to be

conducted by the homeworkers themselves as the members of a cooperative.⁴

[fol: 373] As a result of these conferences, in late June and early July, 1957 Mr. Bird proceeded with the organization of a cooperative under the Consumers Cooperative Act of the State of Maine (R.S. Me. 1954, c. 56). The following steps were taken for this purpose. Small subscription fees were obtained from various prospective members to help pay the expenses of organization. Mr. Bird mailed to prospective members a letter dated June 28, 1957, describing the nature and advantages of cooperatives and the method of their organization, and calling a meeting "of all the homeworkers who are interested in establishing a cooperative," to be held on July 9, 1957 at the Jefferson Hotel in Waterville.⁵ Approximately 40 women, all of

⁴ The testimony of Mrs. Whitaker, who was plaintiff's sole witness, and of various homeworke-members of the Cooperative, who testified for defendants, was that the suggestion that the business be reorganized on a cooperative basis originated with the Wage and Hour Division Investigator, who also advised that in his opinion the Act would not apply if the business were reorganized as a *bona fide* cooperative controlled by the homeworkers themselves. Although personally present in Court, the Investigator did not testify. In order to avoid the necessity of his doing so, the parties stipulated at the conclusion of the hearing that if he were called, he would testify that at various conferences between him and Mr. Bird during the spring of 1957 the possibility of the organization of a cooperative was discussed; that the idea of a cooperative did not originate with the Wage and Hour Division; and that "the idea of organizing a cooperative arose spontaneously as a result of these joint discussions, no one participant in the discussions being solely responsible." It was further stipulated that the Investigator was not authorized to state the official position of the Wage and Hour Division.

⁵ The following excerpts from this letter are significant:

"June 28, 1957.

Dear :

You have indicated by sending your subscription fee to this office that you are interested in establishing an organi-

[fol. 375] whom had previously supplied Mrs. Whitaker with infants' wear, were present at the organizational meeting thus called. Mr. Bird presided, and Mrs. Whitaker was also present. At this meeting formal Articles of Association were signed by the individual defendants and 26 of the ladies present; Mr. Bird explained the proposed Certificate of Organization and By-laws which had been prepared by him; after discussion and a few minor changes, the form of Certificate of Organization was approved and the By-laws were adopted; and a board of five Directors and a Clerk were elected. The Directors elected were Mrs.

zation which will enable you and many others like you to continue your home work business and which will enable you to have a ready market for the products which people [fol. 374] such as you make in your own homes. The purpose of this letter is to briefly outline the method by which such an organization is established and operated. . . .

In the past whenever a group of individuals has been confronted with a situation whereby they could not as individuals do certain things for themselves as well as they could as a group, they have, in thousands of cases, organized what is known as a *cooperative*.

Generally speaking a cooperative consists of a group of individuals who have established an organization to promote the economic welfare of each individual who is a member. Each individual member has rights equal to that of every other member. . . . In a cooperative everyone is on an equal basis. Thus a cooperative is a very democratic type of organization.

. . .

A cooperative of home workers here in Maine would benefit the home workers in the following ways:

1. It would enable them to comply with the Federal Laws concerning wage and hour regulations.
2. It would enable them to purchase supplies at wholesale prices.
3. It would enable them to market their products more readily.
4. It would increase the uniformity of products.
5. As a going organization they would be able to exert

Fernande Loubier, Mrs. Dana Banton, Mrs. Audrey Leavit, Mrs. Nettie Boyington and Mrs. Harold Edmonds. Stanley L. Bird, Esq., the defendant Bird's father, was named Clerk. Immediately following adjournment of the organizational meeting, the Board of Directors met and elected Mrs. Banton as its Chairman, Mr. Bird as President and Mrs. Whitaker as Secretary-Treasurer. Mr. Jack Kennedy, a cousin of Mrs. Whitaker's husband and a retired electrician from Vassalboro, Maine, was elected Vice President. All of the Directors had previously supplied Mrs. Whitaker with infants' wear. However, none of the Directors was in any way related to Mrs. Whitaker, and only Mrs. Leavit [fol. 376] and Mrs. Edmonds had previously worked for her as trimmers or had been associated with her in any other business capacity. The statutory Certificate of Organization of the Cooperative was signed by the officers

more influence in matters effecting their economical (sic) welfare.

6. It would enable them to take advantage of other economic opportunities which as a group they could obtain at reduced costs, such as hospitalization, life insurance, etc.

A cooperative is organized by first having a meeting of the people who are interested in setting up the cooperative. At this meeting they organize themselves into an association for the purpose of establishing a cooperative. They decide what the purposes of the cooperative will be, what the rules and regulations will be concerning membership and the operation of the cooperative, the election of a board of directors and officers (sic), signing of the incorporation papers, and planning for an over all business policy for the coming year. . . .

There is every reason to believe that people such as yourselves could make a cooperative work successfully. As a matter of fact, I believe that this is the only way which you can expect to reach a large market and to obtain the maximum amount of economical (sic) benefit from the work which you perform in your own homes.

Very truly yours, Bird & Bird, By —, —."

and Directors on the day of the meeting. It was approved by the Office of the Attorney General of the State of Maine on July 10, 1957 and recorded in the Registry of Deeds for Waldo County, Maine on July 12, 1957. A copy was filed with the Secretary of State of the State of Maine on July 18, 1957. On the same date Mrs. Whitaker ceased doing business individually, and the Cooperative commenced doing business, with its place of business at Mrs. Whitaker's home in Troy.

The Certificate of Organization is in the simple form customary in Maine practice. It provides for the organization of a cooperative without capital stock; states that its purpose shall be, among others, "to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail"; and lists the names of the original Directors and officers.

The By-laws are also in usual form,⁶ and copies have been printed and distributed to the membership. Because of their direct bearing on the issue of whether the Cooperative [fol. 377] is controlled by the individual defendants or by the homeworkers, it is necessary to summarize their provisions in some detail. They provide that the objective of the Cooperative shall be "to promote the economic welfare of members and to perform any and all other related functions found desirable by the Cooperative to further the economic welfare of the members." They also confirm that the Cooperative is formed not for profit and shall not have capital stock. They state that the members of the Cooperative are to consist of the original incorporators and such persons, firms or corporations as are accepted for membership by the members, or by the Board of Directors or by its authorized representative. Each member is required to acquire a "membership interest" at a cost of \$3.00 and to agree to comply with the Articles of Incorporation and the By-laws. No person may own more than one share interest in the Cooperative, and membership interests are not transferrable. The Board of

⁶ See Packel, *Law of Cooperatives*, Pages 385-403 (3rd ed. 1956).

Directors, after notice and hearing, may expel any member for failure to comply with the By-laws or any duly adopted rule or regulation of the Cooperative. Each member is entitled to one vote, to be cast in person and not by proxy. An annual meeting of the members is to be held each year and such special meetings as are called by the President, either on his own initiative or when directed by the Board of Directors or when requested by 10% of the members. Two weeks' written notice of members' meetings is necessary, and the quorum originally required was 51% of the members.⁷

[fol. 378] The By-laws further provide that the Directors and officers of the Cooperative shall be elected, for one-year terms, by and from the members, and that at all elections nominations shall be made from the floor and the voting shall be by closed ballot. The Directors are responsible for managing the affairs of the Cooperative. Regular meetings of the Directors are to be held monthly, and special meetings as called by the President or any three Directors. The powers of the President are limited to presiding at members' and Directors' meetings, without the right to vote at members' meetings except in the event of a tie, or, at Directors' meetings unless he is also a Director. The Vice President is empowered to act for the President in the event of the latter's absence or disability. The Treasurer has the custody and control of the funds of the Cooperative, and is authorized to sign checks. The By-laws also provide for the selection by the Board of Directors of a Manager, who "shall have general supervision over the property and the affairs of the Cooperative, subject always, however, to the direction, management and control of the Board of Directors." An officer or Director may be removed by vote of 75% of the members present at a meeting called for the purpose. The Treasurer and Manager must be bonded.

The By-laws provide that the capital of the Cooperative shall consist of the aggregate amount of the membership interests and that any "excess receipts" of the Coopera-

⁷ The 51% quorum proved to be unworkable, and was reduced to a requirement of 25 members at the annual meeting held on June 26, 1958. *Infra* p. 16.

tive, after payment of its operating expenses, may, at the discretion of the Board of Directors, be used for patronage [fol. 379] refunds to the members to be distributed according to the percentage of work submitted to the Cooperative for sale. The By-laws expressly prohibit the payment of dividends to members on their membership interests. As originally adopted, the By-laws prohibited the sale by members to any wholesale or retail business of products similar to those produced by the Cooperative, and required the members to obtain all of their materials from the Cooperative.⁸

Finally, the By-laws provide that they may be amended only by vote of a majority of the members present at a meeting called for the purpose.

Shortly after the Cooperative started business, the Directors employed Mrs. Whitaker as General Manager at a salary of \$55.00 per week, and approved payment of a salary of \$50.00 per week to Mr. Bird for his services as President and legal counsel.⁹ As President, Mr. Bird has not participated actively in the management of the business of the Cooperative, other than through his attendance and advice at members' and Directors' meetings. As General Manager, Mrs. Whitaker receives articles sent or delivered to her home by the members; makes out duplicate invoice slips itemizing the articles submitted and noting the "advancements" then due the members; supervises the [fol. 380] trimming and packing by a conceded Cooperative employee; fills orders by mailing the goods directly to the stores which purchase them; completes the invoice and shipping records; receives the checks in payment for articles purchased; deposits the checks in the Cooperative checking account and forwards the deposit slips to the Treasurer.¹⁰ The Treasurer now makes payments to the

⁸ This provision was also deleted by vote of the members at the annual meeting on June 26, 1958, *infra* p. 17.

⁹ It was stipulated by the parties that Mr. Bird's salary represented "fair and reasonable compensation" for his services to the Cooperative.

¹⁰ Mrs. Whitaker resigned as Treasurer in October, 1957 and was replaced by Mrs. Banton, *infra* p. 15.

members once every two months upon the basis of the duplicate invoice slips furnished by Mrs. Whitaker, in a total amount specified by the Directors.

At the date of the hearing the Cooperative had a total membership of approximately 200 ladies, including some from outside the State of Maine. During the fourteen months from the organization of the Cooperative to the date of the hearing, a total of twelve Directors' meetings, one annual meeting of members, and one special meeting of members had been held. Mr. Bird was present and presided at all these meetings, except at the annual membership meeting when he was absent. Mrs. Whitaker was present at all the meetings for the purpose of reporting on the business of the Cooperative; although she frequently left a meeting after completing her report. Neither Mr. Bird nor Mrs. Whitaker voted at any meeting. It is significant that at almost every meeting of the Board of Directors from 4 to 30 members, other than the Directors, were [fol. 381] also present and participated in the discussions.

A review of the minutes of the members' and Directors' meetings held during this period reveal the following typical actions taken at these meetings. On July 24, 1957, at the first meeting of the Directors following the organization of the Cooperative, it was voted to purchase Mrs. Whitaker's entire inventory at market prices, and also her accounts receivable.¹¹ On August 22, 1957 the Directors voted to pay members on or before the 20th of the month for all goods received by the 10th of that month. At the same meeting the Directors authorized the preparation of an exclusive sales agreement with Mrs. Doris Law.¹² On October 10, 1957 the Directors accepted the resignation of Mrs. Whitaker as Treasurer and elected Mrs. Banton in her place. This election was confirmed at a special meeting of the members held on October 26, 1957. At that special meeting the members voted not to pay for goods received between the 10th and 20th of November until December 19, 1957. There were 41 members present at

¹¹ The evidence indicates that the accounts receivable were not in fact taken over by the Cooperative.

¹² This is the same Mrs. Law who was the defendant in *Mitchell v. Law*, 161 F. Supp. 795 (W.D. Tenn. 1957).

this meeting. On January 21, 1958 the Directors voted to drop 3 members because of sub-standard work and authorized the President to apply for a \$5,000. bank loan to be secured by inventory. On March 6, 1958, the previous application [fol. 382] having been rejected by the bank, the Directors authorized the President to reapply for a \$5,000. loan to be secured by the personal endorsement of the Directors and the Vice President.¹³ The Directors further voted that no advance allowances be paid to members until the articles submitted by them had been sold. On April 10, 1958, the bank loan having been negotiated, the Directors established a loan repayment fund. On May 15, 1958 the Directors authorized partial advances to members on a percentage basis, and approved the date and agenda for the annual meeting of the members. On June 26, 1958 the annual meeting of the members was held at the Pilots' Grill in Bangor, Maine. Notice of this meeting was mailed to all members, and 37 were present in person. In Mr. Bird's absence, the Vice President, Mr. Kennedy, presided, and Mrs. Whitaker, as General Manager, gave a report on the status of the business of the Cooperative. A full financial report was presented for the Treasurer by Francis W. Jacob, Esq., who had been employed by the Directors in September, 1957 to act as tax counsel and auditor for the Cooperative.¹⁴ At this meeting the members also voted to amend the By-laws to reduce the quorum [fol. 383] requirement to 23 members, and to delete the By-law provision requiring that members obtain all their materials from the Cooperative. The Vice President appointed a Nominating Committee, and the officers and Directors were unanimously reelected, except that Mrs. Matilda Ireland and Mrs. Ola Miller were named to re-

¹³ Neither Mrs. Whitaker nor Mr. Bird endorsed this note.

¹⁴ Mr. Jacob is a graduate of Bowdoin College and Harvard Law School and a former Professor at Law at the University of Idaho Law School. Since his retirement 20 years ago, he has engaged in taxation and business counselling from his residence in South China, Maine. He is not related to Mrs. Whitaker, nor had he been previously associated with her in any business capacity.

place Mrs. Boyington and Mrs. Loubier as Directors, and Mr. Jacob was elected Clerk.¹⁵ Further meetings of the Directors were held on July 23, August 16, and September 11, 1958, at which various methods were discussed for solving the financial problems which the Cooperative was facing.

Financially, the operation of the Cooperative has been far from a success, primarily because of excessive inventory and overhead, and lack of sales. As of September 4, 1958 it had an operating deficit of \$4,537. During its first twelve months of operation its gross sales amounted to \$45,000.,¹⁶ and Mr. Jacob's testimony indicated that the Cooperative could survive as a financially solvent enterprise only by doubling its present gross income. Its inability to keep pace with its current overhead is probably best reflected in the fact that, as of September, 1958, it had paid Mr. Bird only \$1,750. of the \$2,950. then due him for salary; had paid Mrs. Whitaker only \$1,441. of the \$3,290. then due her for salary; had paid Mrs. Whitaker [fol. 384] only \$951. of the \$7,110. due her for her inventory; and had utilized the entire \$5,000. bank loan for operating expenses. Payments to members for articles furnished by them are now made only once every two months, and there are substantial past-due accounts. The understanding has consistently been that the members would receive at least 60% of the sale price of an article, with 20% going to operating expenses and 20% to sales commissions. In practice the members have actually received about 58% thereof.

As indicated, the first issue presented is one of fact: Is this business controlled by the individual defendants or is it controlled by the homeworkers? For if, in reality, the Cooperative is controlled by the individual defendants, then the simple, economic fact is that the members are

¹⁵ Neither Mrs. Ireland nor Mrs. Miller is related to Mrs. Whitaker. Neither had had any previous business relationship with her, except that Mrs. Ireland had supplied Mrs. Whitaker with infants' wear.

¹⁶ Mrs. Whitaker did a gross business of approximately \$19,000. during her last, and most successful, year of individual operation.

working for the . . . (individual defendants) and hence are employees of the . . . (individual defendants) and the cooperative within the meaning of the Act." *Fleming v. Palmer, supra*, 123 F. 2d at 751.

A close examination of the history, corporate structure and present operation of this Cooperative, which have been recited in detail above, compels the conclusion that this Cooperative is a *bona fide* cooperative organized and controlled by its members for their mutual benefit, and it is not merely a subterfuge created and utilized by the individual defendants for the purpose of protecting Mrs. Whitaker's business operations from the application of the Fair Labor Standards Act.

It is true that the individual defendants actively participated in the organization of the Cooperative for the express purpose of attempting to avoid application of the Fair Labor Standards Act to the homeworkers here involved. However, this fact alone is not sufficient to bring the Cooperative within the scope of the Act. *Fleming v. Palmer, supra*, 123 F. 2d at 759. Avoidance of a federal regulatory statute is not synonymous with its evasion. To organize Mrs. Whitaker's former homeworkers into a cooperative for the purpose of permitting them to continue to produce and sell their handiwork in a manner not within the reach of the law was not illegal or immoral. If, in fact, the Act does not apply to a true cooperative controlled by its members, these ladies had a right so to organize, and the individual defendants had a right to assist them in doing so. From this record, it appears that this was what was done in this instance. *Cf. Walling v. Plymouth Mfg. Corp.*, 139 F. 2d 178 (7th Cir. 1943), *cert. denied*, 322 U.S. 741 (1944).

Plaintiff places much reliance upon *Fleming v. Palmer, supra*, and *McComb v. Homeworkers Handicraft Cooperative, supra*, but neither case supports plaintiff's position with respect to this Cooperative. In *Fleming v. Palmer*, the Court was presented with a pseudo-cooperative which it found to be under the complete domination and control of the Palmers and operated by them for their sole benefit. In *McComb v. Homeworkers Handicraft Cooperative*, the evidence revealed a cooperative functioning as a mere instrumentality of the bag companies, which had been the

worker-members' former employers. Here, a thorough study of the record discloses control of the Cooperative [fol. 386] to be vested, both under its By-Laws and in actual operation, in the member-workers, who have agreed to pool their labor and split their profits in a joint enterprise for their own benefit.

On the present record, the Court finds as a fact that the individual defendants do not control this Cooperative or its members, and that the members are not as a matter of economic fact working for the individual defendants. The Court has accordingly concluded that the Fair Labor Standards Act is not applicable to the business of this Cooperative, as it has been set up and operated, unless the Act applies to member-controlled cooperatives *per se*.

It, therefore, becomes necessary for the Court to pass upon plaintiff's second contention, which is that the Act is applicable to a *bona fide* cooperative controlled by its members.¹⁷

¹⁷ In the course of argument and in their brief the defendants conceded that there is a serious question as to the legality of the organization of the Cooperative under the Maine Consumers Cooperative Act, which would appear to contain no provision for the organization of a marketing cooperative such as here involved. The defendants have also conceded the absence of the quorum required by the By-laws and other minor irregularities in connection with the two membership meetings which have been held by the Cooperative. The record before this Court, however, discloses that the Certificate of Organization has received the approval of the authorities of the State of Maine as meeting the requirements of the Maine statute. Whether the requirements of Maine law have been met is not an issue in this case and is certainly a different issue from the issues of control and of the applicability of the Fair Labor Standards Act here involved. Cf. *Fleming v. Palmer*, *supra*, 123 F. 2d at 762. This proceeding is not the forum for collateral attack upon the corporate existence of this Cooperative. *Taylor v. Portsmouth, Kittery and York Street Ry*, 91 Me. 193, 199 (1898); see *Consolidated Electric Cooperative v. Panhandle Eastern Pipeline Co.*, 189 F. 2d 777, 782 (8th Cir. 1951). Similarly, the evidence

[fol. 387] Initially, it must be noted that there is no doubt that a cooperative *may* be an employer and have employees subject to the provisions of the Fair Labor Standards Act. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949); *Puerto Rico Tobacco Marketing Cooperative v. McComb*, 181 F. 2d 697 (1st Cir. 1950).¹⁸ Thus in the instant case the ladies who are hired to do the trimming and packing for the Cooperative, and Mrs. Whitaker as General Manager, are conceded by the defendants to be employees of the Cooperative. Further, this Court has held that the Act applies to homeworkers *per se*. *Mitchell v. Nutter*, 161 F. Supp. 799 (D.C. Me. 1958). The only substantial issue before this Court, therefore, is whether the producer-members of a marketing cooperative are its employees within the meaning of the Act.¹⁹

[fol. 388] There is no reported case considering the issue here presented. The Court of Appeals for this Circuit in *Fleming v. Palmer*, *supra*, expressly declined to pass on the question because of its factual conclusion that the cooperative there involved was controlled by the Palmers

reveals that the operation and conduct of the business of the Cooperative have been in substantial conformity with the By-laws. Any failure to comply technically with the By-laws in every respect is immaterial to this decision and merits no further discussion.

¹⁸ Section 3(a) of the Act, 29 U.S.C.A. § 203(a), provides: " 'Person' means an individual, partnership, association, corporation, . . . or any organized group of persons." The definition of "employer" in Section 3(d) of the Act, 29 U.S.C.A. § 203(d) incorporates this definition of "person." See Fn. 19 *infra*.

¹⁹ There can be no question that under Section 3(d) of the Act, 29 U.S.C.A. § 203(d), an injunction should issue against the individual defendants as officers of the Cooperative if an employment relationship is found to exist between the Cooperative and these homeworkers, for Section 3(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."

and not by its members. For similar reasons, the question was not reached by the Court of Appeals for the Fourth Circuit in *McComb v. Homeworkers Handicraft Cooperative, supra*.

As recently stated by this Court in *Nutter*, the question here at issue is to be determined, not by the traditional test of the master-servant relationship under the common law, but by a consideration of the history, terms and purposes of the Fair Labor Standards Act. *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60, 63 (6th Cir. 1943). See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-151 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The Court must then be guided in its decision by the intent of Congress in the passage of the Act as revealed by the language of the statute, its legislative history and its purposes.

The Act itself in Section 3(e) defines "employee" as including "any individual employed by an employer." 29 U.S.C.A. § 203(e). And "employ" is defined in Section 3(g) as including "to suffer or permit to work." 29 U.S.C.A. § 203(g). It is true that this definition of employment was described by Senator (now Mr. Justice) Black as "the broadest definition that has ever been included in any one Act." 81 Cong. Record 7657, and in *United States v. Rosencwasser*, 323 U.S. 360 (1945), the Supreme Court stated in respect to this statutory language (323 [fol. 389] U.S. at 362): "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." However, the statutory definition in the Act itself is hardly helpful in providing an answer to the present question. In fact, the judicial decisions interpreting and applying the Act have consistently held that there is no simple, uniform and easily applicable test to determine whether persons doing work for others are within the scope of the Act, but that the test is whether as a matter of "economic reality" such persons are employees. *United States v. Silk*, 331 U.S. 704, 713 (1947).

The legislative history of the Act is similarly unenlightening. Specific Congressional references to cooperatives, in context, are directed solely to the applicability of the Act to persons who are "employees" of a cooperative

in the sense concluded by *Farmers Reservoir & Irrigation Co. v. McComb*, *supra*.²⁰

It, therefore, becomes necessary to examine the purposes of the Act in order to determine whether Congress intended that it apply to the relationship between a marketing cooperative and its producer-members.

As stated by the Supreme Court in *United States v. Darby*, 312 U.S. 100 (1941), the Fair Labor Standards Act sets up a "comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products [fol. 390] and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act." (312 U.S. at 109). In the same case, the Court declared that the purposes of the Act, as set forth in the declaration of policy contained in Section 2(a),²¹ are "to exclude from interstate commerce goods produced . . . under conditions detrimental to the maintenance of the minimum standards

²⁰ See e.g. 81 Cong. Record 7660, 7873, 7876, 7927-7928, 7947, 8658; and 82 Cong. Record, Part 2, 1506, 1776, 1784 and 1802. Similarly, the publications of the Wage and Hour Division themselves purport only to deal with the applicability of the Act to common law "employees" of a cooperative and not with its applicability to members of a cooperative. See e.g. 29 C.F.R. §§ 780.80-82 (1949) (Farmers' Cooperative Associations).

²¹ 29 U.S.C.A. § 202(a). "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

of living necessary for health and general well-being" (312 U.S. at 109) and "to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions . . ." (312 U.S. at 115). It has also been authoritatively stated that the broad scope of the Act cannot be denied. *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). And the Act has been described as "highly remedial" and [fol. 391] calling for "a liberal construction so as to embrace every employer or employee coming reasonably within its scope." *McComb v. Consolidated Fisheries Co.*, 75 F. Supp 798, 800 (D.C. Del. 1948), *aff'd.*, 174 F. 2d 74 (3rd Cir. 1949). See also *Fleming v. Palmer*, *supra*, 762; *Bowie v. Gonzalez*, 117 F. 2d 11, 16 (1st Cir. 1941).

The teaching of the above cases is that this Court should adjudge an employment relationship to exist here, if, *reasonably*, these Cooperative members can be considered "employees" under the Act. However, neither the declaration of policy contained in the Act itself,²² nor the judicial decisions interpreting and applying the Act indicate that the intent of Congress was to exclude from interstate commerce goods produced otherwise than under substandard labor conditions resulting from an employment relationship, in which the conditions of the relationship require the protection of the Act. Thus in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), the Supreme Court stated (324 U.S. at 706-707): "The statute was a recognition of the fact that *due to the unequal bargaining power as between employer and employee*, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." (Emphasis supplied). Again in *Walling v. Portland Terminal Co.*, *supra*, the Supreme Court said (330 U.S. at 152): "The Act's pur-[fol. 392] pose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." (Emphasis supplied). And in

²² See fn. 21, *supra*.

NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), a case brought under the National Labor Relations Act, 29 U.S.C.A. § 151, *et seq.*, a companion piece of legislation, the Supreme Court in interpreting the term "employee" stated (322 U.S. at 129): "That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. 'Where all the conditions of the relation require protection, protection ought to be given.'" (Emphasis supplied).

When the rule thus stated is applied to the issue presented in the instant case, it is difficult to see how the homeworkers here involved require the protection of the Act, or that the Act should be applied to them. The evidence discloses a marketing cooperative organized and operated by these ladies for the purpose of permitting them to sell to better advantage the products of their handicraft. In essence, the Cooperative exists to render services to its members; it receives the products produced by its members, sells the products for its members and distributes the net proceeds to its members as the articles submitted by them are sold. The record shows that the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear, and that they are so engaged for their own mutual benefit, and not as [fol. 393] employees employed by anyone. Their interests as members and producers are identical. The work they perform is performed by them as members of the Cooperative, and not as its employees. (*Cf. Walling v. Plymouth Mfg. Corp.*, 139 F. 2d 178 (7th Cir. 1943, *cert. denied*, 322 U.S. 741 (1944)).

The "economic reality" of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative "suffer or permit" them to work. It has no connection with their labors. Rather, they, collectively, "suffer or permit" themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers. The Congress may wish in its legislative wisdom to declare that they so

employ themselves. But in the opinion of this Court, the Act as written does not now so provide. This Court will not judicially legislate, whether it be urged to do so by homeworkers as in *Mitchell v. Nutter, supra*, or, as here, by the Department of Labor.

Judgment for the defendants, without costs.

Edward T. Gignoux, Judge, U. S. District Court.

Dated February 13, 1959.

[fol. 394] DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MAINE, NORTHERN DIVISION

CIVIL ACTION FILE No. 1050 N. D.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Plaintiff,

v.

WHITAKER HOUSE COOPERATIVE, INC., PHILIP S. BIRD, President, and EVELYN M. WHITAKER, General Manager, Defendants.

~~DIRECTION TO ENTER JUDGMENT~~

To the Clerk:

Enter judgment in the above-entitled case, in accordance with Opinion and Order, filed and dated February 13, 1959, for the Defendants, and without costs.

Edward T. Gignoux, U. S. District Judge.

Date: —

Note.—If the judge is required not only to direct the entry of judgment but also to approve of the form thereof, it is suggested that, in lieu of signing the above form, he write at the bottom of the form of judgment "Form of judgment approved. Enter," following his signature with his title and the date. See Rules 52 and 58 of the Federal Rules of Civil Procedure.

[fol. 395] PROPERTY OF THE UNITED STATES

United States Court of Appeals For the First Circuit.

No. 5513

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Plaintiff, Appellant.

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL., Defendants,
Appellees

Appeal from the United States District Court for the
District of Maine

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH,
Circuit Judges

[170 F. Supp. 743].

Sylvia S. Ellison, Attorney, with whom *Harold C. Nystrom*, Acting Solicitor of Labor, *Bessie Margolin*, Assistant Solicitor, *William Massar*, Attorney, and *Thomas L. Thistle*, Regional Attorney, were on brief, for appellant.

Philip S. Bird, with whom *Bird & Bird* was on brief, for appellees.

OPINION OF THE COURT—March 2, 1960

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Maine entered for the defendants after a trial before the court sitting without a jury.

The action was brought by the Secretary of Labor under Section 11(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1066 (1938), 29 U.S.C. § 211(a) (1958), to enjoin defendants from violating certain provisions of the Act. [fol. 396] The complaint, in the parts pertinent to this appeal, alleged that since July 18, 1957 defendant Whitaker House Cooperative, Inc., defendant Philip S. Bird as president of the cooperative, and defendant Evelyn M. Whitaker as general manager of the cooperative, have violated the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of

the Act by paying substandard wages, and by failing to keep records and to obtain certificates for homeworkers as required by the regulations issued under the Act. It was conceded by the defendants that the violations had occurred if the Act is applicable. It was stipulated that the only question for the district court's determination was whether the homeworkers, all of whom are members of the cooperative, are "employees" within the meaning of Section 3 of the Act.

The Secretary contended, first, that the cooperative is not a *bona fide* cooperative controlled by its members, and that, in reality, the individual defendants control the cooperative, hence an employment relationship exists between the homeworker-members and the individual defendants; and second, even if the cooperative is a *bona fide* cooperative controlled by its members, the Act applies to such a member-controlled cooperative. The district court found that the individual defendants do not control the cooperative or its members, and that the members are not as a matter of economic reality working for the individual defendants. The Court also held that the provisions of the Act are not applicable to a *bona fide* cooperative controlled by the member-producers.

Findings of facts by the court sitting without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed. R. Civ. P. 52(a). The parts of the record cited to us do not establish that the district court was clearly erroneous in its finding that the [fol. 397] cooperative was a *bona fide* cooperative controlled by the member-producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a *bona fide* cooperative with control by the member-producers.

Fleming v. Palmer, 123 F.2d 749 (1 Cir. 1941), cert.

denied sub. nom. *Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942), is distinguishable as not being a *bona fide* cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers. In *McComb v. Homeworkers' Handicraft Cooperative*, 176 F.2d 633 (4 Cir.), cert. denied 338 U.S. 900 (1949), the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account. See *id.* at 640.

The essential factor in determining the application of the Act is whether or not there is an employment relationship, for that is the frame of reference in which Congress placed its mandates. Although the purposes of the Act have been broadly stated as "to exclude from interstate commerce goods produced . . . under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being . . ." [fol. 398] *United States v. Darby*, 312 U.S. 100, 109 (1941), the statute is drawn clearly to apply to employment relationships. See, e.g. Sec. 206, 52 Stat. 1062 (1938), 29 U.S.C. § 206 (1958).

The Act states:

"(a) 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

"(e) 'Employee' includes any individual employed by an employer.

"(g) 'Employ' includes to suffer or permit to work, . . . 52 Stat. 1060 (1938), 29 U.S.C. § 203 (a), (d), (e), (g) (1958).

The language of these sections is not very helpful in deciding the instant case. However, the test of the applicability of the Act has been held to be whether or not as a matter of economic fact there is an employer-employee relationship involved. *Fleming v. Palmer, supra*; *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me. 1958).

It is clear that a cooperative can have employees. *Farmers Irrigation Co. v. McComb*, 337 U.S. 755 (1949); *Puerto Rico Tobacco Marketing Coop. Ass'n v. McComb*, 181 F.2d 697 (1 Cir. 1950). But those cases did not involve the question of whether member-producers of a cooperative are considered employees of the cooperative and consequently within the provisions of the Act.

The only case which apparently involved this precise question was the district court decision in *Fleming v. Palmer, supra*, which was not reported. The district court's refusal there to enjoin the cooperative in regard to its members resulted from the court's conclusion that no employer-employee relationship existed. *Id.* at p. 751. An analogous conclusion as to a partnership involving approximately one hundred persons was reached by the district court in *Walling v. Plymouth Mfg. Corporation*, 46 F. Supp. 433 (N.D.Ind. 1942), *aff'd* on other grounds, 139 F.2d 178 (7 Cir.), *cert. denied* 322 U.S. 741 (1943). In each of those cases, however, the Court of Appeals stated that it was unnecessary for it to decide the question of applicability of the Act to a *bona fide* enterprise.

Additional authority for the conclusion that the Act does not apply to a cooperative such as involved here is found in the statement of the Administrator of the Wage and Hour Division, U. S. Department of Labor, that in certain situations there might be no employer-employee relationship between a cooperative and its member-workers.¹

¹ 1941 WH Man. 58.

"Application to Cooperatives

"Question: Are cooperatives employers and are members who work for them employees within the terms of the Fair Labor Standards Act.

"Answer (Administrator): The term cooperative is used to describe various types of business organizations differing in form and method of operation. Accordingly,

[fol. 400] We believe that the instant case presents such a situation. The members of the cooperative individually are the producers of the goods in which the cooperative deals. We agree with the district court's characterization that "the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear." *Id.* at p. 755. Where the items produced by the members are the units used for measuring each member's share in the cooperative's net income, we think, to quote again from the district court's opinion: "Their interests as members and producers are identical. The work

no statement can be made to cover all types of organizations calling themselves cooperatives. However, it may be said generally that no justification can be found for concluding the member-workers of cooperatives, otherwise covered, are not entitled to the benefits of the Act.

"Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members.

"Cooperatives are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends.

they perform is performed by them as members of the Cooperative, and not as its employees." Consequently, there is no employment relationship present in the production of the items and the Act is not applicable to this cooperative.

Judgment will be entered affirming the judgment of the district court.

WOODBURY, *Chief Judge*, (concurring). The courts should always be alert to ferret out and ever ready to strike down evasive schemes designed to circumvent the Fair Labor Standards Act. But there is a wide and well recognized difference between evasion and avoidance, and although the Cooperative here may have been organized to avoid the Act, if it is a *bona fide* organization, as we all agree, and not a sham as in *Fleming v. Palmer*, it seems to me that in economic reality it is an organization engaged in the business of marketing such of the products of its producer-members as they may see fit to submit to it for sale. [fol. 401] As a sales agency for its producer-members it may have employees, but however broadly the term may be defined, I do not see how it can be said to be an "employer" with respect to its producer-members. I vote to affirm.

ALDRICH, *Circuit Judge* (dissenting). I regret that I am unable to concur in the opinion of the court in this case. I quite agree that the district court's finding that the workers are not employees of the individual defendants, Bird and Whitaker, is based on substantial evidence, and must be sustained. In other words, the corporate defendant, hereinafter called Cooperative, must be taken to be member-controlled, and not the alter ego of the individual defendants. But the court errs when it says that it is controlled by "the" members. It is clear that it is controlled by only some of them. A substantial number live outside of the state, in another part of the country, and obviously take no part.* Others live in distant portions of the state, or are old or infirm, or for other reasons do not find it worth their while to attend meetings. Such "members" cannot be said to exercise entrepreneurial skill, and they do not exercise, and in many instances are unable to exer-

* "Each member is entitled to one vote, to be cast in person and not by proxy." 170 F. Supp. 743, 749.

cise, any control, effective or otherwise. To them Cooperative simply furnishes an opportunity to do homework, and to dispose of it, that is to say, get paid for it. The workers are told what items to make, are paid at stated rates, and are "expelled" if their work does not measure up to Cooperative's standards. It seems to me that all inactive members differ in no respect from employees of any homework employer.

However, I think the matter lies deeper than this, and that the court is in error even if it could be assumed that [fol. 402] all workers had a real vote, and an equal interest in Cooperative's affairs. Cooperative still constitutes an independent entity within the meaning of the Act, whether it be regarded as a corporation, or as an "organized group of persons." 29 U.S.C. § 203(a). Indeed, this fact is, concededly, the principal reason for its existence. As the organizational letter pointed out, it serves, among other things, to permit the members "to purchase supplies at wholesale prices," and "to market their products more readily." The testimony emphasized the vital importance of this. In the truest sense Cooperative "suffer[s] or permit[s] these ladies to work." 29 U.S.C. § 203(g). If it were not for its existence (or that of some similar central organizational group), with the economic advantages flowing therefrom, no member could work at all. The organization of a group, all of whom will work in a unified direction, is a *sine qua non* of effective operation. Each member is working for the group, for its advantage, through the medium of Cooperative, and not simply for herself. This seems to me a peculiarly poor case in which to say that the worker "suffer[s] or permit[s] herself to work." Rather, it is Cooperative that is affording individual members the opportunity to work, and paying them for it.

If the thought is that Cooperative is simply a selling organization, because it serves to dispose of the product of its members, I suggest that it is no more a sales organization than is any other employer of homeworkers whose amount of production is self-controlled (but who were restricted to selling to it). Clearly it does much more than dispose of the product. It is true, as the court says, that the "items produced by the members are the units used for measuring each member's share in the cooperative's net income." But of what piecework employee is that not so,

if one defines net income as the amount available from gross sales, after deductions, for labor and goods? Is the [fol. 403] court saying it makes a difference because there is nothing provided by way of profits to stockholders?

I cannot help feeling that the court has been moved by sympathy with the natural desire of these ladies to make some use of their spare time, in an awareness of the predicament they would be in if the Act were to be held applicable. But there is another side to the coin. These ladies are competing with other producers who must, perforce, respect the standards of the Act. Because of the existence of Cooperative they can, or believe they can, compete with other producers satisfactorily, whereas individually they could not hope to do so. If, for some reason, it is "fair" not to apply the Act to them, such a "fairness" is unfair to those others who must live up to it. Possibly the court feels that since the members are receiving from Cooperative all the proceeds available, the Act is inapplicable. However, neither economic inability to perform, nor the low commercial value of the work done, are considerations under the Act. Historically, the application of minimum-wage laws always threatens certain fringe, or marginal activities. But it is not for the courts to temper the wind to the legislatively shorn lamb. *Mitchell v. Railway Express Agency, D.C.D. Maine, 1958, 160 F.Supp. 628.*

The fact that members exercise a joint voice over Cooperative's management, and elect officers and an executive committee, seems to me irrelevant. If a union were given a voice in management, would its members cease to be employees? If an employee acquires stock in his company, does he cease to be an employee? I do not believe that would be so even if the employees together acquired all of the stock—they would still be working for the corporate entity. Their employment status would remain, even though they might have acquired some additional status. Phrased in terms of the philosophy of the Act, this would be because while collectively they would have a voice, individually [fol. 404] they would have none, or none of any consequence. And so here. The Supreme Court has emphasized that "employment" under this Act is broadly defined. *United States v. Rosenwasser, 1945, 323 U.S. 360, 362; Rutherford Food Corp v. McComb, 1947, 331 U.S. 722, 728-29, reh. den.,*

332 U.S. 785. In a particular instance a court may believe, to quote the court below, that some particular workers do not "require the protection of the Act." My brethren do not pick up this language, but I believe it accurately states their rationale. Perhaps, individually, some in fact do not. But I see no more basis for a court's saying that as the members "suffer or permit" themselves to work they do not require the protection of the Act, than there is for so determining as to any other worker who "voluntarily" chooses to work. That concept died a quarter of a century ago. I would reverse.

[fol. 405] UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, Petitioner,

VS.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

JUDGMENT—March 2, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: /S/ Roger A. Stinchfield, Clerk.

Approved:

/S/ Peter Woodbury, C. J.

[fol. 406] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1959

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, Petitioner,

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon Consideration of the application of counsel for
petitioner,

It is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including July first, 1960.

Felix Frankfurter, Associate Justice of the Supreme
Court of the United States.

Dated this twenty-seventh day of May, 1960.

[fol. 407] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1960

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, Petitioner,

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon Consideration of the application of counsel for
petitioner,

It is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, further extended to and including July 30th, 1960.

Felix Frankfurter, Associate Justice of the Supreme
Court of the United States.

Dated this 29th day of June, 1960.

[fol. 408] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1960

The petition herein for a writ of certiorari to the United
States Court of Appeals for the First Circuit is granted,
and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

FILE COPY

No. 274 -

FILED

JUL 28 1960

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,

Solicitor General,

Department of Justice, Washington 25, D.C.

HAROLD C. NYSTROM,

Acting Solicitor of Labor,

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Assistant Solicitor,

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Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on March 2, 1960.

OPINIONS BELOW

The opinion of the District Court (R. 78-99) is reported at 170 F. Supp. 743. The opinions in the Court of Appeals (App. A, *infra*, pp. 33-34) are reported at 275 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1960 (App. A, *infra*, p. 43). By orders of Mr. Justice Frankfurter, dated May 27, 1960, and June 29, 1960, the time for filing a petition for a writ of certiorari was extended to and including July 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the relationship between the "member-producer" homeworkers and the respondent Cooperative and its managing officials—who admittedly organized the Cooperative to replace a previous relationship between the general manager and the homeworkers under another type of avoidance arrangement which was held to be covered by the Fair Labor Standards Act—is an employment relationship subject to the Act, or whether such a cooperative organization, even if "*bona fide*," effectively converts the homeworkers into independent self-employed individuals so that the Act and its regulations restricting homework can be lawfully avoided.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) and the Regulations issued pursuant thereto are set forth in Appendix B, *infra*, pp. 44-52. The statutory provisions particularly involved are Sections 3(a), (d), (e), and (g) and Section 11(d), which read as follows:

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(g) "Employ" includes to suffer or permit to work.

SEC. 11.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

STATEMENT

This action was filed under Section 17 of the Fair Labor Standards Act to enjoin Whitaker House Cooperative, Inc., and respondents Whitaker and Bird, from violating the minimum wage, record-keeping, and shipping provisions of the Act (Sections 6, 11(c) and 15(a)(1)), and from failing to obtain special homemaker certificates for the women who make, in their homes, the goods in which the Cooperative deals, as required by the Wage Order for the Knitted Outerwear Industry, issued pursuant to old Section 8(f)

of the Act and Section 11(c), which order was continued in full force and effect by Section 11(d), added to the Act in 1949 (App. B, *infra*, p. 45).¹

At a pre-trial conference, respondents conceded noncompliance with the Act's requirements in the respects charged in the complaint, as well as petitioner's right to an injunction against each of them, if the homeworkers involved in this action are "employees" within the Act (R. 79). At the beginning of the trial, respondents further conceded that if the workers in question are "employees," "it would necessarily follow that they are industrial homeworkers within the meaning of the Act and [the pertinent] regulations" (Tr. 3-4).²

1. The Cooperative is primarily engaged in the production, sale, and distribution of articles of infants' knitwear, but it has recently added toys and women's capes and stoles to its line of merchandise. All of these goods are made by homeworkers. The finishing work (trimming and packaging) is done by admitted employees of the Cooperative. Respondent Whitaker,

¹ As originally filed, the complaint alleged similar violations on the part of Mrs. Whitaker during the period prior to July 17, 1957, when she operated the business in her own name (*i.e.*, before transferring it to Whitaker House Cooperative, Inc.). Later, however, by stipulation of the parties, the complaint was dismissed as to the violations during this earlier period (R. 78). The complaint was also dismissed against Mrs. Whitaker in her capacity as treasurer of Whitaker House Cooperative, Inc., it appearing that she had resigned from this position on October 10, 1957 (R. 89).

² "Tr." references are to the typewritten transcript of the trial court proceedings, which is a part of the original record that has been certified to the Clerk of this Court. The certified original record also contains the exhibits, requests for admissions and responses thereto cited in the text.

the Cooperative's general manager, first entered the infants' knitwear business about 25 years ago (R. 80). In the beginning, she furnished the yarn out of which the homeworkers made the booties, caps and sacques, but some years ago, when she ceased operations for a while, she transferred her yarn business to a neighbor, Mrs. Pearl L. Nutter—the same Mrs. Nutter who was later enjoined by the trial court below (also Gignoux, D.J.) from violating the Act in the employment of homeworkers (R. 94). See *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me.).

During the early years of her operations, Mrs. Whitaker disposed of her goods through various out-of-state concerns, including the Edward S. Wagner Company which also employed homeworkers and was subsequently enjoined from doing so (R. 80).³ After she resumed operations about five years ago (R. 81), she began selling some of her goods to or through Mrs. Doris Law, who operated a similar business in Tennessee until she was enjoined from employing homeworkers in violation of the Act, in June 1957 (R. 89).⁴

During the period immediately prior to the formation of the Cooperative, Mrs. Whitaker had approximately 163 homeworkers (R. 81), who knitted or crocheted articles of infants' wear for her in their homes. At her own home in Troy, Maine, Mrs.

³ See *McComb v. Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y., 1950), reversed on other grounds, *sub nom. Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2), and *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964. See also *infra*, pp. 28-29.

⁴ See *Mitchell v. Law*, 161 F. Supp. 795 (W.D. Tenn.).

Whitaker employed a helper to trim the garments and to assemble them in sets (*ibid.*). She did not furnish the yarn during this period, and the homeworkers obtained it from a Mrs. Fannie Johnson of Unity, Maine (Tr. 27), who later joined the Cooperative (R. 12). Mrs. Whitaker, however, set the price which she would pay for the garments on a piece-rate basis (R. 81). In addition, she would show the women "samples of the sort of things" she wanted (Mrs. Whitaker's Answer to Req. for Ad. No. 19), and tell them the colors to use. If their work was unsatisfactory, she would reject it and tell them how it could be improved and the homeworkers followed her instructions to the extent that they were capable (Tr. 26). As the trial court expressly found, "the relationship between Mrs. Whitaker and these homeworkers was substantially identical to that between Mrs. Nutter and her homeworkers, which this Court described at length, and held to be an employment relationship within the Fair Labor Standards Act, in *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me. 1958). There can be no question that if Mrs. Whitaker were presently operating as previously, her operations would fall within the scope of *Nutter*, and an injunction should issue" (R. 81). The Wage and Hour Division of the Department of Labor had formally so advised Mrs. Whitaker in January, 1957 (R. 81-82), and it was following this advice that respondent Whitaker House Cooperative, Inc., was formed.

2. It is not disputed, and the trial court found, that Mrs. Whitaker and her attorney, respondent Bird, "actively participated in the organization of the Cooperative for the express purpose of attempt-

ing to avoid application of the Fair Labor Standards Act to the homeworkers, here involved" (R. 92). Formation of the Cooperative was begun by calling a meeting of "all the homeworkers who are interested in establishing a cooperative" (R. 83). This was done by a form letter prepared by Mrs. Whitaker's attorney (R. 83). The letter assured the homeworkers that a cooperative "would enable them to comply with the Federal Laws concerning wage and hour regulations" (R. 71). It further stated that a cooperative would not only enable the workers to continue to make products in their homes, but would also "increase the uniformity of [the] products" and benefit the workers by "enabl[ing] them to purchase supplies at wholesale prices" (R. 83-84).

The organizational meeting was held in Waterville, Maine, on July 9, 1957 (R. 83). Mr. Bird presided and it was attended by Mrs. Whitaker and approximately 40 of the women who had made articles of infants' wear for Mrs. Whitaker (*ibid.*). Bird, Mrs. Whitaker, and 26 of the women present signed the original Articles of Association and approved the By-laws, which had been prepared in advance by Bird (R. 84). Two of the women had also worked for Mrs. Whitaker as trimmers (R. 85). These two trimmers and three of the homeworkers were made directors of the new enterprise (R. 84-85). Mrs. Whitaker's attorney (respondent Bird) became president; a cousin of her husband, John P. Kennedy, became vice-president (R. 84); and Mrs. Whitaker herself was made general manager (R. 87), as well as secretary-treasurer (R. 84). The final formality of filing a copy of the Cooperative's Certificate of Or-

ganization with Maine's Secretary of State was accomplished on July 18, 1957, whereupon Mrs. Whitaker ceased operating on her own, and transferred her business to the Cooperative "lock, stock and barrel" (R. 19; 26-28, 85).⁵

The By-laws state that the objective of the Cooperative is to promote the "economic welfare of members" (R. 85) and provide that "All persons, including married women and minors, firms and corporations shall be eligible for membership" (Art. 6, Sec. 1; Pltf's. exh. 2). Homeworker-applicants for membership are required to buy from the Cooperative a sample "of the work that they are to do" (R. 43), copy the sample, and submit the copy to the Cooperative (R. 54). If the work is found to be satisfactory, the applicant becomes a member upon purchasing a membership interest for \$3.00 and agreeing to comply with the Articles of Incorporation and the By-laws (R. 86). The By-laws, among other things, prohibit members from furnishing knitted articles of the type dealt in by the Cooperative to other businesses (Art. 13, Sec. 3; R. 54) and require that members remain such for at least a year (Art. 6, Sec. 6; Pltf's. exh. 2). Members, however, may be "expelled" sooner for violation of any rules or regulations or if their work is substandard (which has been the reason assigned for "expelling" at least three members) (R. 62).

⁵ The Cooperative was chartered as a corporation under Maine's Consumer's Cooperative Act (R.S. Me., 1954, c. 56), but, as respondents have conceded, there is a serious question as to its legality since that Act contains no provision for the organization of a merchandising cooperative such as here involved (R. 93).

The financial interest of the members in the Cooperative is meager. As noted above, a membership interest costs only \$3.00, and the By-laws specifically provide that "No member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (Art. 4, Sec. 2; Pltf's. exh. 2).

The members have little or no entrepreneurial skill,⁶ and their participation in the control of the Cooperative is as slight as their financial interest. Two membership meetings have been held since the Cooperative was organized in July 1957, but neither meeting had a quorum which, under the By-laws, is 51 percent of the members (R. 86). At the special meeting held in October 1957, only 41 out of 172 members were present (R. 37, 55). At the annual meeting held in June 1958, the Cooperative had 195 members, but only 37 attended the meeting (R. 30). Neither meeting was adjourned for lack of a quorum, as the By-laws require (see Article 7, Section 7; Pltf's. exh. 2), and at the June 1958 meeting the 37 members in attendance proceeded to "amend" the By-laws "so that 25 members constitute a quorum" (R. 58) and then "elected" officers and directors for the ensuing year. (*ibid.*).

Under the By-laws, management of the Cooperative is vested in its Board of Directors and general

⁶ The Cooperative's accountant made this clear when he stated that "after the Cooperative gained momentum [during the fall, the late fall], the members sent in material in tremendous quantities, not being aware—after all, they have no reason to be aware—that the big season for the Christmas merchandise * * * is not just before Christmas but is back in August and September. * * *" (Tr. 275).

manager (R. 86-87). The three most faithful members of the Board are Mrs. Leavitt and Mrs. Edmonds, both of whom had previously worked for Mrs. Whitaker as trimmers (R. 84-85), and Mrs. Ella Banton, (a former homemaker for Mrs. Whitaker) who now serves as the Treasurer (R. 41, 44).⁷ Mrs. Leavitt has attended all Board meetings, except one (R. 59-68). Mrs. Edmonds has not missed a single meeting (*ibid.*), and neither has Mrs. Banton (R. 41). The Board meets monthly at Mrs. Whitaker's home. Between monthly meetings, Mrs. Whitaker is in full charge of the Cooperative (R. 29). Although the By-laws provide that the manager is to run the business subject "to the direction, management and control of the Board of Directors" (R. 87), Mrs. Whitaker testified that she has "no particular way of knowing the actual contents of the records of the [Board's] meeting[s]" (R. 111); that she has never bothered to read through all of the minutes (*ibid.*); and that she frequently leaves the meetings after giving her report on the affairs of the Cooperative (R. 88-89).

Except for changes necessitated by the new form of operating, the business is conducted in much the same way that it was conducted by Mrs. Whitaker prior to formation of the cooperative. Operations are still conducted from Mrs. Whitaker's home, and she, as general manager, still receives the articles sent in or delivered to her home by the workers (R. 88).

⁷ Mrs. Banton was "appointed" Treasurer by the Board of Directors when Mrs. Whitaker resigned as such (R. 61), although the By-laws provide that officers shall be elected by the members (Art. 10, Sec. 1; R. 53).

The articles are still unfinished and must be trimmed and packaged. The homeworkers are still paid on a piece-rate basis, the rates having been established by "management with the consent of the Board of Directors" (Whitaker Cooperative's answer to plaintiff's Interrogatory No. 9);⁸ and the homeworkers are still told what to make, the colors desired, and the designs to be followed (R. 24). As Mrs. Whitaker explained, "we couldn't work any other way" (*ibid.*).

As pointed out *supra*, p. 6, when Mrs. Whitaker operated the business in her own name, the homeworkers bought their yarn from Mrs. Fannie Johnson of Unity, Maine. It appears that they still get yarn from Mrs. Johnson, and that she, too, has joined the new enterprise (R. 12). Mrs. Doris Law, who used to deal with Mrs. Whitaker before her operations in Tennessee were enjoined (see *supra*, p. 5), has also joined the new enterprise. She is the Cooperative's "exclusive sales agent" (R. 89) and has been such almost from the beginning (R. 60).

Since the advent of Mrs. Law, the Cooperative has grown in membership. It now has some 200 members, many of whom live in Tennessee (R. 8-17).⁹ It has also expanded its line of merchandise to include toys and women's capes and stoles (R. 112-113). Still further expansion is expected, if respondents

⁸ The piece rates are now referred to as "advance allowances." They are, however, definite amounts, and the homeworkers expect to be, and are, in fact, paid on the basis of such rates (R. 39, 52).

⁹ The names of the Tennessee members are, in many instances, identical to those of Mrs. Law's homeworkers as set forth in *Mitchell vs. Law*, *supra*, p. 5, fn. 4, or so similar as to suggest they are the same persons.

should prevail in this litigation; * and the By-laws and charter are broad enough to permit this. The By-laws do not limit membership to residents of the New England states or Tennessee, and the Cooperative now has members in ten different states (R. 8-17). Nor does the Cooperative's charter restrict production to articles of infants' wear. On the contrary, as the trial court noted, the charter states that the purposes of the Cooperative "shall be, among others, 'to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail' " (R. 85).

Despite the Cooperative's growth and expansion, it has not yet been a financial success. This is because its operating expenses, particularly the salaries fixed for respondents Whitaker and Bird and the 20 percent sales commission for Mrs. Law (the exclusive sales agent), are such that the Cooperative "could survive as a financially solvent enterprise only by doubling its present gross income" (R. 91). Even then the homeworkers would apparently still be receiving the same substandard rates that they are now

* While respondents' accountant was being questioned about the financial condition of the Cooperative and its prospects for the future, he said: "What is expected is that if fortunately for them the Cooperative and its officers should prevail in this action, they will be swamped with business. Many people, there is no question, are waiting to see how this comes out and who have said they won't send anything into the Cooperative until they know that the Cooperative is going on * * *" (Tr. 279).

being paid, with little or no hope of receiving anything additional by way of dividends. The Cooperative's accountant testified, "If the business were approximately doubled and ran shall we say from \$85,000 to \$90,000 gross sales, the ratio of commissions and payments to members would be unchanged" (R. 51). While he stated that the "remainder which would be left * * * would be sufficiently large so that something at [the Cooperative's then] general level of overhead could be carried" (*ibid.*), the Cooperative's outstanding debts would have to be paid before there would be any excess receipts for distribution to the members. As of September 4, 1958, the Cooperative was indebted to Mrs. Whitaker in the amount of \$7,908 for back salary and inventory. It was also behind in respondent Bird's salary to the extent of \$1,200, and owed commissions to Mrs. Law in the amount of \$2,550 (R. 73-74).

3. On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative,¹⁰ and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act (R. 92). The basis of the holding is not entirely clear. At one point, the court expressed the view that "the members are engaged, through the Cooperative, in a joint venture" (R. 98), thus indicat-

¹⁰ While we believe this finding is clearly erroneous, we do not challenge it in this petition because we think, as Judge Aldrich did, that "the matter lies deeper than this" (App., *infra*, p. 40). However, we reserve the right to question the correctness of the finding that the Cooperative is a "bona fide" member-controlled organization, if certiorari should be granted.

ing that it may have considered the Cooperative and its members to constitute a single entity. At another point, however, the court seems to have recognized that the Cooperative was a separate entity from its members. "It," said the trial court, "has no connection with their labors. Rather, they [the members], collectively, 'suffer or permit' themselves individually to work" (R. 99).

The Court of Appeals affirmed, with Judge Aldrich dissenting, and with the two majority judges (Chief Judge Woodbury and Judge Hartigan) each writing a separate opinion (App. A, *infra*, pp. 33-43).

REASONS FOR GRANTING THE WRIT

I

The court below has decided an important question concerning the Fair Labor Standards Act's coverage of homeworkers. While this Court has not as yet ruled specifically on this particular problem, it has recognized the importance of related questions—the meaning and scope of the Act's employment relationship coverage (*Rutherford Food Corp. v. McComb*, 331 U.S. 722; *United States v. Rosenwasser*, 323 U.S. 360; *Walling v. Portland Terminal Co.*, 330 U.S. 148, at 150-151), and the scope of the statutory authority to restrict or regulate homework in order to prevent the circumvention of, and to safeguard, the statutory minimum wage rate (*Gemsco, Inc. v. Walling*, 324 U.S. 244). The question presented by the instant case is at least as far-reaching and important to the administration of the Act as the issues reviewed and determined in those cases.

The decision below is the first court of appeals decision, during the almost 22 years since the enactment of the Fair Labor Standards Act, to hold that the applicability of this Act to homeworkers can be avoided by a legal arrangement or organization purporting to deal with them as independent contractors or independent producers, but retaining large measures of actual control in a few principal individuals. The general problem of homeworker activity is not a novel one, having been litigated in numerous cases in the lower courts.¹¹ However, since

¹¹ There have been many cases in the infants' knitwear industry alone. See *McComb v. Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y.), affirmed in part and reversed in part, *Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2); *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D. N.Y.), affirmed, *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964; *Harwood v. Tobin*, 194 F. 2d 538 (C.A. 6), affirming *Tobin v. Harwood*, 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.); *Mitchell v. Law*, 161 F. Supp. 795 (W.D. Tenn.); *Mitchell v. Nutter*, 161 F. Supp. 709 (D. Maine). See also *Jacobs v. Hand Knitcraft Institute*, Civil No. 6-354 (S.D.N.Y.), consent decree entered on November 21, 1939, against eleven hand knittercraft companies, the main firms then utilizing substantial numbers of homeworkers (not officially reported, but printed in 2 Labor Cases (CCH) para. 18,478 and summarized in 2 Wage and Hour Reporter 499, November 27, 1939 issue) (see *infra*, pp. 18-19).

For decisions of Courts of Appeals in other industries, see *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60 (C.A. 6) (embroideries industry); *Fleming v. Palmer*, 123 F. 2d 749 (C.A. 1), certiorari denied, 316 U.S. 662 (embroideries industry); *Walling v. Twyeffort, Inc.*, 158 F. 2d 944 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785 (garment industry); *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900 (bag manufacturing industry).

The district court decisions involving homeworkers in such other industries are legion. See *Walling v. Wolff*, 63 F. Supp.

the appellate courts have consistently held homeworkers to be employees subject to the Act, regardless of a variety of legal arrangements designed to avoid coverage, the danger of a widespread homeworker problem has been forestalled without need for review by this Court. But there is now a pressing need for review of the decision below, because, in our view, it affords an easy means of vitiating the effect of this long line of previous court decisions, and threatens a widespread revival of the serious homeworker problem which existed in the infants' knitwear industry, as well as in other industries, at the time of the enactment of the Fair Labor Standards Act.

The industry most immediately affected is the knitted and crocheted infants' wear industry which has been traditionally classified as a branch of the knitted outerwear industry. While the respondent

605 (E.D.N.Y.) (embroideries industry); *Walling v. Frank*, 62 F. Supp. 261 (W.D. Ky.); *Walling v. F. L. Dunne Co.*, 7 WH Cases 317 (D. Mass.), 13 Labor Cases (CCH) para. 64, 045; *Walling v. Malouf*, 7 WH Cases 1068 (S.D. Calif.), 12 Labor Cases (CCH) para. 63,740 (garment industry); *Mitchell v. Roberts*, 179 F. Supp. 247 (S.D. Calif.); *Mitchell v. American Republic Ins. Co.*, 151 F. Supp. 529 (S.D. Iowa); *Durkin v. Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Walling v. Sieving*, 5 WH Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) para. 63,098 (direct mail advertising industry); *Mitchell v. Northwestern Kite Co.*, 130 F. Supp. 835 (D. Minn.); *Walling v. Hastings*, 6 WH Cases 554 (S.D. Ind.), 11 Labor Cases (CCH) para. 68,485; *Nelson v. Kuepper Favor Co.*, 1 WH Cases 854 (N.D. Ill.) (novelty manufacturing industry); *Walling v. Freidlin*, 66 F. Supp. 710 (M.D. Pa.) (rug industry); *Fleming v. Demeritt Co.*, 56 F. Supp. 376 (D. Vt.) (clothespin manufacturing industry); *Mason v. T. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S.D.N.Y.) (optical industry).

Cooperative's business thus far has related largely to articles of infants' wear, its charter does not so restrict it, and at the time of the trial the Cooperative had already extended its activities to include some women's knitted outerwear (R. 112; see the Statement, *supra*, pp. 4, 11-12). These two industries—infants' and women's knitted outerwear—were, at the time of the enactment of the Fair Labor Standards Act, foremost among those whose labor standards were plagued by a serious homemaker problem (see *Industrial Homework Under the National Recovery Administration*, United States Department of Labor, Children's Bureau, Publication No. 234, pp. 21-32). At the time of the N.R.A. study, in 1936, there were reported to be some 17,000 homeworkers, located in 29 states, being utilized in the knitted outerwear industry, large numbers of whom had been recruited in small towns and rural districts by New York manufacturers and distributors in order to be free from the New York homework law prohibiting work on infants' clothing in tenements (*id.* at 24-25). The homeworkers in the infants' wear branch of the industry were the lowest paid of any workers in any of the 28 industries then using substantial numbers of homeworkers (*id.* at 28, 2), two-thirds of such homeworkers earning less than 5 cents an hour and almost one-half earning no more than 3 cents an hour (*id.* at 13, 17, 28). In the women's knitted garment branch of the industry, although the earnings were not quite so low (but only a few of the most skilled earned as much as 15 cents an hour), the evil of excessively long working hours was most prevalent, "a working week of 50,

60, and even 70 hours [being] not uncommon" (*id.*, 40).

Upon enactment of the Fair Labor Standards Act, the significance of the homeworker problem to the enforcement of the statutory minimum labor standards in the knitted outerwear industry (including specifically the infants' wear industry) was at once apparent. During the first year of the Act's operation, the Administrator was confronted with a large-scale overt plan, on the part of the principal manufacturers and distributors in the knitted outerwear industry, to avoid the Act's application to homeworkers by a so-called "purchase and sale" arrangement whereby the homeworkers were designated as "manufacturers" and any employment relationship was explicitly disclaimed. This serious threat to the enforcement of the Act in the industry which employed the notoriously lowest paid homeworkers was forestalled, and the problem had been largely resolved by the end of the first year of the Act's operation, by a consent decree issued November 21, 1939, enjoining the 11 principal manufacturers and distributors in this industry from paying any of their homeworkers less than the minimum wage or employing them for longer hours without paying statutory overtime, and, also, specifically, "[f]rom using or adopting any scheme or device, or taking any action directly or indirectly, to evade the provisions of the Act or of this judgment, and in particular but without limiting the generality hereof, from using or adopting any scheme or device involving so-called purchase and sale arrangements with any homeworkers or other employees." *Jacobs v.*

Hand Knitcraft Institute et al, Civil No. 6-354 (S.D. N.Y.), not officially reported, 2 Labor Cases (CCH) para. 18,478, page 145.

This consent decree was supplemented by inclusion in the Knitted Outerwear Wage Order, issued April 3, 1942, of a prohibition of homework in the industry except by persons who obtained special homework certificates issued pursuant to regulations of the Wage and Hour Division of the Labor Department (*supra*, pp. 3-4; *infra*, pp. 45-52; 7 Federal Register 2592, April 4, 1942, subsequently codified, as amended, in 29 C.F.R. Part 530). These regulations received explicit legislative ratification by the enactment of Section 11(d), *supra*, p. 3, in the 1949 Amendments to the Act (*infra*, pp. 26-28). During the 18 years since the effective date of the Wage Order restriction on homework, there have been several sporadic attempts (by firms or persons not enjoined by the above consent decree) to avoid or evade the application of the Act and the regulations, but the consistent judicial condemnation of these attempts (see the decisions cited *supra*, pp. 15-16, n. 11), bolstered by the explicit legislative approval of the homework restrictions and repeated legislative refusal to enact proposals to exempt rural homeworkers from the requirements of the Act (*infra*, pp. 25-28), has thus far prevented the revival of a serious homeworker problem in this and other industries.

The decision below affords an easy means for revival of the previous serious homework problem throughout the Nation—not only in the infants' hand-knitted wear industry, but in the knitted outerwear industry generally, and also in the embroideries in-

dustry—and without even any need for organization of new cooperatives. While the respondent Cooperative had acquired, at the time of trial, only 200 homework members located primarily in rural areas of Maine and Tennessee (but also a few scattered members in eight other States, R. 8-17), its charter is not limited to any particular regions nor to knitted infants' wear, but includes in its purposes "to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in *general to carry on a knitted wear business*" (R. 85; emphasis added), and its by-laws provide for unlimited expansion by making "all persons, including married women and minors, firms and corporations * * * eligible for membership." (By-laws, Art. 6, Sec. 1; Deft's Exh. 2; emphasis added). Thus, under the ruling below, the homeworker problem in the embroideries industry, which has long been regarded as settled since this Court's decision in *Gemsco v. Walling*, 324 U.S. 244 (upholding the validity of the regulation prohibiting homework in this industry), could well be revived through expansion of the operations of the respondent Cooperative (see also *supra*, p. 12, fn. 9). An aggravated aspect of this threatened revival is its child labor implications. As pointed out in *Gemsco*, it was undisputed that in the embroideries industry, in addition to the prevalence of substandard piece rates, "hidden child labor [was] a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves" (324 U.S. at 253 n. 17).

Since the employment definitions of the Act apply to its child labor restrictions as well as to the wage and hour standards (see *Rutherford, supra*, 331 U.S. at 728), the decision below likewise has serious child labor implications.

Even if there were reasonable assurances that this particular Cooperative would not expand its operations into other industries, the effect of the holding below on other industries would nonetheless be substantial, since the same disposition to avoid the Act's application to homeworkers has been evidenced in other industries to which the cooperative form of organization here involved is as readily adaptable (see *supra*, p. 15, fn. 11).

II

The court below clearly erred in holding that the homeworkers in the respondent Cooperative are not "employees" covered by the Fair Labor Standards Act. The admitted facts in this record, evaluated under the historical criteria governing application of this Act, should have compelled a ruling of coverage.

A. The record reveals that the Whitaker House Cooperative, Inc., was admittedly organized on the initiative of respondent Whitaker and her attorney (respondent Bird) for the purpose of avoiding the application of the Act to homeworkers in the knitwear industry who, in a consistent line of judicial decisions involving other comparable avoidance arrangements (see fn. 11, *supra*, pp. 15-16), had been held to be employees subject to the Act and to the homework regulations. See the Statement, *supra*, pp. 5, 6-7. The original

incorporators were Mrs. Whitaker and Bird, and some 26 homeworkers who had previously made knitwear for Mrs. Whitaker under an arrangement which the trial court found had been an employment relationship subject to the Act (*supra*, p. 6). The Cooperative now has 200 homeworker-members, located in ten scattered states but primarily in rural areas of Maine (where Mrs. Whitaker had previously conducted her individual business) and Tennessee (where the Cooperative's "exclusive sales agent" (Mrs. Law) had previously conducted a similar business until enjoined from employing homeworkers), and, as we have pointed out (*supra*, pp. 16-17, 20), further expansion is contemplated and is provided for in the charter and by-laws.

Before becoming members, all of the homeworkers, except the few original incorporators, must prove their qualification as knitters by purchasing a sample of work from the Cooperative, copying it, and submitting the copy for approval by the Cooperative's Board of Directors or authorized representative, in addition to purchasing a membership interest at the cost of \$3.00, and agreeing to abide by the Cooperative's by-laws, rules, and regulations. The by-laws, which were prepared in advance by respondent Bird and approved by the original incorporators, provide that members may not withdraw from membership for at least a year, and may not make or sell to any other business the same or similar products being produced by the Cooperative, but that they may be "expelled" for failure to observe the by-laws or any rules and regulations. The Cooperative's Board

or managing officials, in addition to the authority to pass upon membership applications and to "expel" members for failure to observe the by-laws, rules and regulations or for substandard work (which has been exercised in several instances)—*i.e.*, to hire and fire the homeworkers—, also fix the "prices" or piece rates which are paid to the "member-producers," and instruct them as to the designs and colors to be used in the work. See the Statement, *supra*, pp. 8-11.

The incidents of this relationship must be judged by the all-inclusive statutory definitions of employment, construed so as to accomplish the broad ameliorative Congressional purposes, and not by the particular legal labels attached by the parties—such as "independent contractor" or "cooperator." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-151; *United States v. Rosenwasser*, 323 U.S. 360, 362; *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111; *United States v. Silk*, 331 U.S. 704; *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (dissent).¹² Under that directive, the homeworkers here must be characterized as employees, since they are no more truly independent manufacturers or contractors than were the workers in the various homeworker plans previously outlawed by

¹² Of particular significance is this Court's citation in *Rutherford*, *supra* (331 U.S. at 729, n. 8), of the homeworker decisions of the Sixth and Second Courts of Appeals in *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60 and *Walling v. Twyeffort, Inc.*, 158 F. 2d 944 (discussed *infra*, pp. 29 ff), and the denial of certiorari in *Twyeffort* on the same date (331 U.S. 851).

the courts under this Act (*supra*, n. 11, pp. 15-16). The significant control retained by the managers of the Cooperative is plainly sufficient to bring these homeworkers within the statutory coverage.

Moreover, the reasoning below, that the work performed by producer-members of the Cooperative is not performed as employment because "[t]heir interests as members and producers are identical" (App. A, *infra*, p. 38), is inconsistent with this Court's decisions holding that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co. v. McComb*, 337 U.S. 755; 768; *Boutell v. Walling*, 327 U.S. 463, 468, see also *Schenley Corp. v. United States*, 326 U.S. 432 at 437. As pointed out in Judge Aldrich's dissent (App. A, *infra*, p. 42), even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity, particularly in terms of the social philosophy of this Act.¹³

¹³ Not only does the statutory definition of "employer" include "any person acting directly or indirectly in the interest of an employer," defining "person" to mean "individual, partnership, association, corporation * * * or any organized group of persons" (Sections 3(a) and (d)), but the legislative history confirms the Congressional intent to include cooperatives within the scope of the Act. In the earliest discussions of the legislation it was specifically pointed out that the general statutory

B. That the Act should be interpreted as covering these homeworkers is confirmed by the legislative history of the 1949 homework amendment to the Act and of the many unsuccessful bills designed to exempt the very class of rural homeworkers here involved:

In 1939, before the Act was a year old, several bills were introduced in the House of Representatives for the purpose of amending Section 14 so as to authorize the Administrator specifically to permit the employment of rural homeworkers at wage rates lower than the statutory minimum.¹⁴ In its report accompanying

language would apply to cooperative organizations unless specific exemptions were framed to exclude them. See 81 Cong. Rec. 7873, 7876, 7927. An amendment exempting specified cooperative associations was introduced by Senator Borah and adopted by the Senate. 81 Cong. Rec. 7947. A similar proposal was introduced in the House. 82 Cong. Rec. 1776. These provisions were omitted from the Act as adopted.

¹⁴H.R. 5435, the first Norton bill, amended by the House Committee on Labor; H.R. 6406, the second Norton Bill; H.R. 7133, the Barden Bill; H.R. 7349, the Ramspeck Bill. The bills were virtually identical in their proposal for the amendment of Section 14, as follows: "The Administrator shall promulgate regulations permitting the employment, in rural areas, of employees in the home at such wages lower than the minimum wage applicable under section 6, and containing such provisions governing the piece rate to be paid, the time of day during which such work shall be performed, and such other provisions, as the Administrator may prescribe. No such regulation shall be promulgated with respect to any employees (1) if in the opinion of the Administrator the application of section 6 to such employees does not have the effect of curtailing the opportunities of such employees for employment; (2) if the promulgation of such regulation would in the opinion of the Administrator have the effect of curtailing employment in the factories or industrial establishments, if any, in which similar work is performed; or (3) if the promulgation of such regulation would in the opinion of the Administrator give the em-

the proposed amendment for homeworkers, the House Committee on Labor stated: "The act at the present time treats homeworkers just as any other type of employee" (H. Rept. 522, 76th Cong., 1st Sess., p. 10). It was argued that the proposed amendments would restore to rural people additional income which they could earn from industrial homework if the wage and hour requirements were lifted (86 Cong. Rec. 4924, 5122). But the amendments were finally rejected because of the conviction that the economic evils which the Act prohibited should not be restored and that the original legislative aim to include industrial homeworkers within the full scope of the Act was in every respect sound. See, *e.g.*, 86 Cong. Rec. 5225, 5136.

Following this compelling evidence of the original and continuing Congressional intent to include homeworkers within the scope of the Act, the Administrator issued regulations restricting the employment of homeworkers in the several industries in which homework was found to be most prevalent. Although Congress was repeatedly advised of the issuance of these regulations in the Administrator's annual reports,¹⁵ no further attempt to exempt rural homeworkers was made until the 1949 Amendments to the Act were under consideration. At that time Congressman Cooper of Tennessee proposed, and the House adopted (95 Cong. Rec. 11209-11210), an amendment which would have exempted from the Act "any plover or employers of such employees a substantial competitive advantage."

¹⁵ Annual Reports of the Administrator to Congress 1943, pp. 19-20; 1944, p. 17; 1946, p. 5; 1947, pp. 32-33; 1948, pp. 15-17; 1949, p. 29.

homeworker in a rural area who is not subject to any supervision or control by any person whomsoever, and who buys raw material and makes and completes any article and sells the same to any person, even though it is made according to specifications and the requirements of some single purchaser" (Section 13(a)(17) of H.R. 5856). In explaining "the situation sought to be taken care of by this amendment," Congressman Cooper said (95 Cong. Rec. 11209):

There are several hundred women throughout Tennessee, mostly around Gibson County * * * who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anyone who might want to purchase them. In recent years Mrs. Doris Harwood, of R.F.D., Trenton, Tenn., has been operating a small business from her home, about 4 miles from Trenton. She buys these articles from the women of that section, who are largely farmers' wives * * *

It is my understanding that the Wage and Hour Division * * * has notified Mrs. Harwood that she could not buy any of this crocheted wearing apparel from any of these women unless they were physically handicapped and that they were required to have a medical certificate to this effect before they could make these articles and sell them to her.¹⁸

¹⁸ This is the same Mrs. Harwood who was enjoined from employing and underpaying non-certificated homeworkers in *Harwood v. Tobin*, 194 F. 2d 538 (C.A. 6), affirming *per curiam* the decision of the district court (not officially reported), 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.). See *infra*, pp. 29 ff.

The Senate bill contained no such exemption. The conference agreement followed the Senate and established no exemption for homeworkers; the Conference Report makes clear that this omission was not unintentional. H. Rept. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14933. On the contrary, there was added new subsection 11(d) (*supra*, pp. 3, 19), continuing in full force and effect the administrative homework regulations which had theretofore been issued, and, in addition, authorizing the Administrator to restrict or prohibit homework. 95 Cong. Rec. 14927. And in every Congress since 1949, bills identical to Congressman Cooper's proposal have been offered, but all have failed to gain legislative approval.¹⁷ This informed acquiescence by Congress, consistently since 1939, in the broad application of the Act to homeworkers should be given special weight.¹⁸

III

The decision below, in approach and in result, runs counter to the rulings of other courts of appeals on closely analogous facts raising homeworker prob-

¹⁷ H.R. 4661, 82d Cong., 1st Sess.; Congressman Cooper; H.R. 237, 83d Cong., 1st Sess., Congressman Cooper; S. 1950, 83d Cong., 1st Sess., Senator Kefauver; H.R. 84, 84th Cong., 1st Sess., Congressman Cooper; S. 2963, 84th Cong., 2d Sess., Senator Payne; H.R. 8809, 84th Cong., 2d Sess., Congressman McIntire of Maine; H.R. 2818, 85th Cong., 1st Sess., Congressman McIntire; S. 1160, 85th Cong., 1st Sess., Senator Smith of Maine; S. 25, 86th Cong., 1st Sess., Senator Smith; H.R. 5713, 86th Cong., 1st Sess., Congressman McIntire.

¹⁸ *United States v. American Trucking Ass'n.*, 310 U.S. 534, 543; *Alstate Construction Company v. Durkin*, 345 U.S. 13, 17; *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner v. Mitchell*, 350 U.S. 247, 255.

lems—in particular, with the Sixth Circuit's decisions in *Harwood v. Tobin*, 194 F. 2d 538, and *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60, and with the Second Circuit's decisions in *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303, affirming 115 F. Supp. 118 (E.D.N.Y.), certiorari denied, 348 U.S. 964, and *Walling v. Twyeffort, Inc.*, 158 F. 2d 944, certiorari denied, 331 U.S. 851. The *Wagner* and *Harwood* decisions concerned the very homeworkers who are involved in the instant case and who are making the same kind of knitted and crocheted articles for respondents under virtually the same practical conditions, despite formal differences in the mechanisms utilized. In *Wagner*, which involved New England homeworkers, the device was a "purchase and sale" arrangement, and in *Harwood*, involving Tennessee homeworkers, it was a "del credere agency" arrangement.¹⁹

¹⁹ *Harwood* and *Wagner* were the decisions which motivated the unsuccessful legislative proposals discussed *supra*, pp. 26-28.

The majority below ignored these decisions apparently because they did not involve the cooperative form, but relied instead on the district court's decision in *Walling v. Plymouth Mfg. Corp.*, 46 F. Supp. 433 (N.D. Ind.), affirmed on other grounds, 139 F. 2d 178 (C.A. 7), certiorari denied, 322 U.S. 741. Apart from the fact that *Plymouth* did not involve either homeworkers or the incorporated cooperative device, the case was decided before this Court's *Hearst*, *Silk*, and *Rutherford* decisions, and its holding is out of line with the great body of law interpreting social legislation. It is also to be noted that, while the court permitted the officials in control of the business (the "senior partners") to escape responsibility as the "employer," it expressly declined to decide whether the enterprise was operated by "a partnership composed of all the parties who signed the so-called partnership agreement" or whether,

The decision below must also be contrasted with the Fourth Circuit's decision in *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; and with the First Circuit's own earlier decision in *Fleming v. Palmer*, 123 F. 2d 749, certiorari denied *sub nom. Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662. These cases, as the court below apparently recognized, involved cooperative organizations paralleling the legal form of respondent Whitaker House Cooperative. The court's distinction of the instant case on the ground of the "district court's finding of a *bona fide* cooperative with control by the member-producers" (App. A, *infra*, p. 35) is not borne out by the *Homeworkers' Handicraft* decision. The Fourth Circuit there reversed the district court, despite the finding that the homeworkers were "independent contractors functioning through the cooperative" (176 F. 2d at 635), stating (through Chief Judge Parker) that the homeworkers' status as employees "has not been affected by the organization of the cooperative, whatever view be taken as to who exercises the real control over it" (*ibid.*) and approving as "manifestly sound" the view "that the 'law of independent contractors,' so far as the Fair Labor Standards Act is concerned, cannot nullify the will of Congress, and take away the benefits of the statute from pieceworkers in the needlework trades, even in the absence of a showing

assuming the existence of "such larger partnership * * * the workers [the so-called "junior partners"] were employees and the partnership was employer within the meaning of the Fair Labor Standards Act" (139 F. 2d at 182).

of domination and control." Referring to "the carefully considered decision of *Walling v. American Needlecrafts*," 139 F. 2d 60 (C.A. 6), *supra*, p. 29, Judge Parker said it was "on 'all fours' with the case here, except as to the effect of the intervention of the cooperative," 176 F. 2d at 637.²⁰ In *American Needlecrafts*, there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fide entered into" (46 F. Supp. at 23 (W.D. Ky.)), and the opinion of the court of appeals was not predicated upon any different assumption. Nor was there any suggestion in the *Harwood* and *Twynfort* decisions, *supra*, that the contracts were not equally "bona fide."

These decisions, like numerous rulings on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory * * * regardless of the good faith of the employer." *Rigopoulos v. Kervan*, 140 F. 2d 506, 507 (C.A. 2). As this Court has stated, "The statute was a recognition of the fact that * * * certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-707; see also *West Coast Hotel*

²⁰ Also, contrary to the apparent assumption by the court below, the Fourth Circuit directed that the decree enjoin the cooperative as well as the bag companies, thus indicating its view that the cooperative was also the employer of the home-workers.

Co. v. Parrish, 300 U.S. 379, and cases cited at pages 392-393.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

HAROLD C. NYSTROM,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

JULY 1960.

APPENDIX A

In the United States Court of Appeals for the
First Circuit

No. 5513

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PLAINTIFF, APPELLANT

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL., DEFEND-
ANTS, APPELLEES.

Appeal from the United States District Court for the
District of Maine

Before WOODBURY, *Chief Judge*, and HARTIGAN and
ALDRICH, *Circuit Judges*

[170 F. Supp. 743]

Sylvia S. Ellison, Attorney, with whom *Harold C. Nystrom*, Acting Solicitor of Labor, *Bessie Margolin*, Assistant Solicitor, *William Massar*, Attorney, and *Thomas L. Thistle*, Regional Attorney, were on brief, for appellant.

Philip S. Bird, with whom *Bird & Bird* was on brief, for appellees.

OPINION OF THE COURT

March 2, 1960

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Maine entered for the defendants after a trial before the court sitting without a jury.

The action was brought by the Secretary of Labor under Section 11(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1066 (1938), 29 U.S.C. § 211(a) (1958), to enjoin defendants from violating certain provisions of the Act. The complaint, in the parts pertinent to this appeal, alleged that since July 18, 1957 defendant Whitaker House Cooperative, Inc., defendant Philip S. Bird as president of the cooperative, and defendant Evelyn M. Whitaker as general manager of the cooperative, have violated the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act by paying substandard wages, and by failing to keep records and to obtain certificates for homeworkers as required by the regulations issued under the Act. It was conceded by the defendants that the violations had occurred if the Act is applicable. It was stipulated that the only question for the district court's determination was whether the homeworkers, all of whom are members of the cooperative, are "employees" within the meaning of Section 3 of the Act.

The Secretary contended, first, that the cooperative is not a *bona fide* cooperative controlled by its members, and that, in reality, the individual defendants control the cooperative, hence an employment relationship exists between the homeworke-members and the individual defendants; and second, even if the cooperative is a *bona fide* cooperative controlled by its members, the Act applies to such a member-controlled cooperative. The district court found that the individual defendants do not control the cooperative or its members, and that the members are not as a matter of economic reality working for the individual defendants. The Court also held that the provisions of the Act are not applicable to a *bona fide* cooperative controlled by the member-producers.

Findings of facts by the court sitting without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed. R. Civ. P. 52(a). The parts of the record cited to us do not establish that the district court was clearly erroneous in its finding that the cooperative was a *bona fide* cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a *bona fide* cooperative with control by the member-producers.

Fleming v. Palmer, 123 F. 2d 749 (1 Cir. 1941), cert. denied sub. nom. *Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942), is distinguishable as not being a *bona fide* cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers. In *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (4 Cir.), cert. denied 338 U.S. 900 (1949), the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account. See *id.* at 640.

The essential factor in determining the application of the Act is whether or not there is an employment relationship, for that is the frame of reference in which Congress placed its mandates. Although the purposes of the Act have been broadly stated as "to exclude from interstate commerce goods produced * * * under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being * * *"
United States v. Darby, 312 U.S. 100, 109 (1941), the statute is drawn clearly to apply to employment relationships. See, e.g. Sec. 206, 52 Stat. 1062 (1938), 29 U.S.C. § 206 (1958).

The Act states:

"(a) 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *

"(e) 'Employee' includes any individual employed by an employer.

* * * *

"(g) 'Employ' includes to suffer or permit to work. * * *" 52 Stat. 1060 (1938), 29 U.S.C. § 203 (a), (d), (e), (g) (1958).

The language of these sections is not very helpful in deciding the instant case. However, the test of the applicability of the Act has been held to be whether or not as a matter of economic fact there is an employer-employee relationship involved. *Fleming v. Palmer, supra*; *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me. 1958).

It is clear that a cooperative can have employees. *Farmers Irrigation Co. v. McComb*, 337 U.S. 755

(1949); *Puerto Rico Tobacco Marketing Coop. Ass'n v. McComb*, 181 F. 2d 697 (1 Cir. 1950). But those cases did not involve the question of whether member-producers of a cooperative are considered employees of the cooperative and consequently within the provisions of the Act.

The only case which apparently involved this precise question was the district court decision in *Fleming v. Palmer*, *supra*, which was not reported. The district court's refusal there to enjoin the cooperative in regard to its members resulted from the court's conclusion that no employer-employee relationship existed. *Id.* at p. 751. An analogous conclusion as to a partnership involving approximately one hundred persons was reached by the district court in *Walling v. Plymouth Mfg. Corporation*, 46 F. Supp. 433 (N.D. Ind. 1942), *aff'd* on other grounds, 139 F. 2d 178 (7 Cir.), *cert. denied* 322 U.S. 741 (1943). In each of these cases, however, the Court of Appeals stated that it was unnecessary for it to decide the question of applicability of the Act to a *bona fide* enterprise.

Additional authority for the conclusion that the Act does not apply to a cooperative such as involved here is found in the statement of the Administrator of the Wage and Hour Division, U.S. Department of Labor, that in certain situations there might be no employer-employee relationship between a cooperative and its member-workers.¹

¹ 1941 WH Man. 58.

"APPLICATION TO COOPERATIVES"

"QUESTION: Are cooperatives employers and are members who work for them employees within the terms of the Fair Labor Standards Act.

"ANSWER (ADMINISTRATOR): The term cooperative is used to describe various types of business organizations differing in form and method of operation. Accordingly, no statement can be made to cover all types of organizations calling themselves

We believe that the instant case presents such a situation. The members of the cooperative individually are the producers of the goods in which the cooperative deals. We agree with the district court's characterization that "the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear." *Id.* at p. 755. Where the items produced by the members are the units used for measuring each member's share in the cooperative's net income, we think, to quote again from the district court's opinion: "Their interests as members and producers are identical. The work they perform is performed by them as member-cooperatives. However, it may be said generally that no justification can be found for concluding the member-workers of cooperatives, otherwise covered, are not entitled to the benefits of the Act.

"Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members.

"Cooperatives are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends.

bers of the Cooperative, and not as its employees." Consequently, there is no employment relationship present in the production of the items and the Act is not applicable to this cooperative.

Judgment will be entered affirming the judgment of the district court.

WOODBURY, *Chief Judge* (concurring): The courts should always be alert to ferret out and ever ready to strike down evasive schemes designed to circumvent the Fair Labor Standards Act. But there is a wide and well recognized difference between evasion and avoidance, and although the Cooperative here may have been organized to avoid the Act, if it is a *bona fide* organization, as we all agree, and not a sham as in *Fleming v. Palmer*, it seems to me that in economic reality it is an organization engaged in the business of marketing such of the products of its producer-members as they may see fit to submit to it for sale. As a sales agency for its producer-members it may have employees, but however broadly the term may be defined, I do not see how it can be said to be an "employer" with respect to its producer-members. I vote to affirm.

ALDRICH, *Circuit Judge* (dissenting): I regret that I am unable to concur in the opinion of the court in this case. I quite agree that the district court's finding that the workers are not employees of the individual defendants, Bird and Whitaker, is based on substantial evidence, and must be sustained. In other words, the corporate defendant, hereinafter called Cooperative, must be taken to be member-controlled, and not the alter ego of the individual defendants. But the court errs when it says that it is controlled by

"the" members. It is clear that it is controlled by only some of them. A substantial number live outside of the state, in another part of the country, and obviously take no part.* Others live in distant portions of the state, or are old or infirm, or for other reasons do not find it worth their while to attend meetings. Such "members" cannot be said to exercise entrepreneurial skill, and they do not exercise, and in many instances are unable to exercise, any control, effective or otherwise. To them Cooperative simply furnishes an opportunity to do homework, and to dispose of it, that is to say, get paid for it. The workers are told what items to make, are paid at stated rates, and are "expelled" if their work does not measure up to Cooperative's standards. It seems to me that all inactive members differ in no respect from employees of any homework employer.

However, I think the matter lies deeper than this, and that the court is in error even if it could be assumed that all workers had a real vote, and an equal interest in Cooperative's affairs. Cooperative still constitutes an independent entity within the meaning of the Act, whether it be regarded as a corporation, or as an "organized group of persons." 29 U.S.C. § 203(a). Indeed, this fact is, concededly, the principal reason for its existence. As the organizational letter pointed out, it serves, among other things, to permit the members "to purchase supplies at wholesale prices," and "to market their products more readily." The testimony emphasized the vital importance of this. In the truest sense Cooperative "suffer[s] or permit[s these ladies] to work." 29 U.S.C. § 203(g). If it were not for its existence (or that of some similar central organizational group),

*"Each member is entitled to one vote, to be cast in person and not by proxy." 170 F. Supp. 743, 749.

with the economic advantages flowing therefrom, no member could work at all. The organization of a group, all of whom will work in a unified direction, is a *sine qua non* of effective operation. Each member is working for the group, for its advantage, through the medium of Cooperative, and not simply for herself. This seems to me a peculiarly poor case in which to say that the worker "suffer[s] or permit[s] herself] to work." Rather, it is Cooperative that is affording individual members the opportunity to work, and paying them for it.

If the thought is that Cooperative is simply a selling organization, because it serves to dispose of the product of its members, I suggest that it is no more a sales organization than is any other employer of homeworkers whose amount of production is self-controlled (but who were restricted to selling to it). Clearly it does much more than dispose of the product. It is true, as the court says, that the "items produced by the members are the units used for measuring each member's share in the cooperative's net income." But of what piecework employee is that not so, if one defines net income as the amount available from gross sales, after deductions, for labor and goods? Is the court saying it makes a difference because there is nothing provided by way of profits to stockholders?

I cannot help feeling that the court has been moved by sympathy with the natural desire of these ladies to make some use of their spare time, in an awareness of the predicament they would be in if the Act were to be held applicable. But there is another side to the coin. These ladies are competing with other producers who must, perforce, respect the standards of the Act. Because of the existence of Cooperative they can, or believe they can, compete

with other producers satisfactorily, whereas individually they could not hope to do so. If, for some reason, it is "fair" not to apply the Act to them, such a "fairness" is unfair to those others who must live up to it. Possibly the court feels that since the members are receiving from Cooperative all the proceeds available, the Act is inapplicable. However, neither economic inability to perform, nor the low commercial value of the work done, are considerations under the Act. Historically, the application of minimum-wage laws always threatens certain fringe, or marginal, activities. But it is not for the courts to temper the wind to the legislatively shorn lamb. *Mitchell v. Railway Express Agency*, D.C.D. Maine, 1958, 160 F. Supp. 628.

The fact that members exercise a joint voice over Cooperative's management, and elect officers and an executive committee, seems to me irrelevant. If a union were given a voice in management, would its members cease to be employees? If an employee acquires stock in his company, does he cease to be an employee? I do not believe that would be so even if the employees together acquired all of the stock—they would still be working for the corporate entity. Their employment status would remain, even though they might have acquired some additional status. Phrased in terms of the philosophy of the Act, this would be because while collectively they would have a voice, individually they would have none, or none of any consequence. And so here. The Supreme Court has emphasized that "employment" under this Act is broadly defined. *United States v. Rosenwasser*, 1945, 323 U.S. 360, 362; *Rutherford Food Corp v. McComb*, 1947, 331 U.S. 722, 728-29, reh. den., 332 U.S. 785. In a particular instance a court may believe, to quote the court

below, that some particular workers do not "require the protection of the Act." My brethren do not pick up this language, but I believe it accurately states their rationale. Perhaps, individually, some in fact do not. But I see no more basis for a court's saying that as the members "suffer or permit" themselves to work they do not require the protection of the Act, than there is for so determining as to any other worker who "voluntarily" chooses to work. That concept died a quarter of a century ago. I would reverse.

JUDGMENT

March 2, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

Approved:

(S) PETER WOODBURY, C.J.

APPENDIX B

STATUTE AND REGULATIONS INVOLVED

1. The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) are as follows:

SEC. 3. [52 Stat. 1061] As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

(e) "Employee" includes any individual employed by an employer.

(g) "Employ" includes to suffer or permit to work.

SEC. 6 [52 Stat. 1062; 63 Stat. 912; 69 Stat. 711] (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than \$1 an hour;

SEC. 11. [52 Stat. 1066] * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall pre-

serve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) [63 Stat. 916-917] The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

SEC. 15 [52 Stat. 1068] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(5) [63 Stat. 919] to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

2. As currently codified, the pertinent parts of the Regulations adopted pursuant to the Fair Labor Standards Act of 1938 reads as follows (29 C.F.R. Part 530):

§ 530.1 Definitions.

(a) The meaning of the terms "person", "employ", "employer", "employee", "goods", and "production", as used in this part, is the

same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homemaker" and "homemaker", as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework", as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homemaker in such production.

* * * * *

(f) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided*, That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulled suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

* * * * *

§ 530.2 Restriction of homework.

No work in the industries defined in § 530.1 (d) through (j) shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.1 of this chapter.

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefor on forms provided by the Wage and Hour and Public Contracts Divisions. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour and Public Contracts Divisions, certificates may be issued to the applicant employer authorizing him to employ a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1) (i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (a) April 4, 1942, in the button and buckle manufacturing in-

dustry; (b) November 2, 1942, in the embroidery industry; (c) April 1, 1941, in the gloves and mittens industry; (d) October 7, 1942, in the handkerchief manufacturing industry; (e) July 1, 1941, in the jewelry manufacturing industry; (f) August 20, 1941, in the knitted outerwear industry; or (g) March 5, 1942, in the women's apparel industry, (except that if this requirement shall result in unusual hardship to the individual homemaker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homemaker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

* * * * *

§ 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

3. When originally issued on March 30, 1942 [7 F.R. 2592], the Regulations restricting the employment of homeworkers in the Knitted Outerwear Industry were codified as 29 CFR 617, and read, in pertinent part, as follows:

PART 617—MINIMUM WAGE RATE AND REGULATIONS APPLICABLE TO HOME WORKERS IN THE KNITTED OUTERWEAR INDUSTRY

* * * * *

§ 617.3 *Restriction of home work.* No work in the Knitted Outerwear Industry, as defined herein, shall be done in or about a home,

apartment, tenement, or room in a residential establishment after November 30, 1942, except by such persons as have obtained special home-work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by any worker who was engaged in industrial home work in the Knitted Outerwear Industry prior to August 20, 1941, or is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Workshop as defined in § 525.1 of this title, and who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home.

* * * * *

§ 617.101 *Definitions.* As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

The term "knitted outerwear industry" as used herein means: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric * * *

* * * * *

4. The original Regulations, Part 617, were clarified on April 20, 1951, as follows [16 F.R. 3435]:

**PART 617—KNITTED OUTERWEAR INDUSTRY,
MINIMUM WAGE ORDER, HOME WORKERS**

DEFINITION OF CERTAIN TERMS

The Administrator of the Wage and Hour and Public Contracts Divisions, pursuant to section 8 of the Fair Labor Standards Act of 1938, as amended, issued a minimum wage order for the Knitted Outerwear Industry, effective April 20, 1942. In conjunction with the issuance of this wage order the Administrator found that in order to carry out the purpose of the order and to prevent the circumvention or evasion thereof it was necessary to include in the order a provision restricting home work in the industry. To accomplish this restriction the Administrator issued regulations which provided that "no work" in the industry "shall be done in or about a home, apartment, tenement, or room in a residential establishment," except under special certificates to be issued only under specified conditions, and which, among other things, defined the term "industrial home work" as the "production by any person in or about a home, apartment, tenement, or room in a residential establishment for an employer of goods from materials furnished directly by or indirectly for such employer."

The Administrator is of the opinion that the regulations were intended to apply to all employment in home work where goods are produced for or on behalf of members of this industry, regardless of the source of the materials used by the homeworkers, and has been enforcing the regulations on the basis that homeworkers employed in this industry were subject to the act and the regulations whether they produced directly for an employer or distributor, or under a so-called "purchase and sale" or "agency" arrangement or other de-

vices designed to disguise the employment relation. The fact that the regulations have been so construed and enforced has been well known to the members of the industry through the institution of court proceedings by the Administrator and the Secretary of Labor (Tobin v. Wagner, *infra*; Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Tobin v. Van Wagen-Sager, Inc. (N.D.N.Y. No. 3129)), and through court decisions upholding such construction (Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Cf. Walling v. Wolff, 63 Fed. Supp. 605 (N.D.N.Y.))

Most of the members of this industry who formerly used or dealt with homeworkers have for years been under court injunction prohibiting the employment of homeworkers except in accordance with the statutory minimum and overtime requirements, and from using any "purchase and sales arrangements with any home workers" to avoid the requirements of the Act or the injunction "whether the materials are furnished by defendants or by others" (Jacobs v. Hand Knitcraft Institute, Civil 6-354 (S.D. N.Y.) 2 Wage and Hour Reporter 499, decree entered November 21, 1939).

The administrative authority to regulate or prohibit such home work clearly exists, particularly since the addition of section 11(d) to the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 29 U.S.C. sec. 211(d)). In a recent decision by the United States Court of Appeals for the Second Circuit in the case of Tobin v. Wagner Company, Inc., (March 21, 1951), the Court expressly recognized the administrative authority to regulate such home work, but questioned the intended scope of the present regulations on the ground that the language defining "industrial home work" is not sufficiently clear in the absence of "published rulings" giving notice of the administrative construction of

such language as being applicable to situations where the homeworkers obtain their materials from a source independent of the person for whom the goods are being produced.

* * * *

Now, therefore, pursuant to authority vested in me by section 11(d) of the Fair Labor Standards Act of 1938, as amended, § 617.101 is amended to read as follows:

§617.101 *Definitions.* The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this part is the same as in the Fair Labor Standards Act of 1938, as amended.

"Industrial homemaker" and "homemaker," as used in this part, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homemaker in such production.

FILED

SEP 30 1960

JAMES R. BROWNING, Clerk

**In the
Supreme Court of the United States**

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, Secretary of Labor, United
States Department of Labor,
PETITIONER,

v.

WHITAKER HOUSE COOPERATIVE, INC., et al.,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The Petitioner's brief properly set forth the opinions below, the jurisdiction of the Supreme Court, and the pertinent statute and regulations involved in this litigation.

Question Presented

Are member-patrons of a true cooperative (i.e. Whitaker House Cooperative, Inc.) employees of themselves under the Fair Labor Standards Act?

Statement

The opinion of the District Court (Petitioner's Record Appendix 78-99, officially reported at 170 F. Supp. 743) contains a fair statement of the facts. (See pages 80 to 91 of the Petitioner's Record Appendix.) However, some aspects of the operation of the Cooperative are omitted, therefore, a short statement is included here for the benefit of the Court.

In the spring of 1957 a group of about fifty women from the central portion of Maine between the ages of thirty-five and eight-five gathered together for the purpose of organizing an association which would enable them to market the products of their hand work. These women for the most part came from what would ordinarily be considered rural areas and would be classified as skilled artists in the making of crocheted and knitted outer wear primarily for infants. Many of these women in conjunction with their husbands own their own homes, made these items in their spare time and for the most part in their own homes with materials such as wool and nylon yarn and knitting needles or crochet hooks supplied by themselves. Most of these women had been making these items for many years, in some cases as much as fifty years.

On July 9, 1957 some thirty of them met as a group at the Jefferson Hotel in Waterville, Maine, for the purpose of organizing themselves. At this meeting they determined to organize into an incorporated cooperative which they named Whitaker House Cooperative, Inc. The purposes of the corporation which was to be established by them was:

1. To manufacture, sell, and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making

and selling knitted, crocheted, or embroidered clothing either at wholesale or retail.

2. To purchase, lease, or otherwise acquire and to hold, use, manufacture, or otherwise dispose of any materials and products which may be involved in the carrying on of the aforementioned business.

3. To do any and all lawful acts and things necessary, pertaining, convenient, or incidental to the foregoing purposes or any part thereof tending to increase the value, usefulness, comfort, or convenience of the property or any part thereof at any time held by said corporation, and to have or exercise all the rights, powers, and privileges appertaining to corporations of a similar nature organized and existing under the laws of the State of Maine; but not, however, to have or exercise any right, power, or privilege for any purpose for which corporations are not permitted to be formed under the General Laws of the State of Maine as provided in Section 9 to 24 both inclusive, of Chapter 56 of the Revised Statutes of Maine, 1954, and acts amendatory thereof or additional thereto." (Whitaker House Cooperative, Inc. charter.)

At this meeting by-laws were read to the assembled group and passed upon after appropriate amendments or changes were made and then finally adopted by those present. The women then elected a Board of Directors from amongst their own group and also officers. Thereafter the organization of the cooperative corporation was completed as of July 18, 1957. The directors then met and hired as general manager one Evelyn M. Whitaker, a person known to the membership and directors at that time as being one who had a great deal of experience in the merchandising of the particular type of articles which these women made and whom they felt to have all the qualifications necessary to

fulfill the position as general manager. The Board of Directors also in behalf of the cooperative agreed to purchase an inventory of articles which the same Mrs. Whitaker had in her possession.

Thereafter the Board of Directors held monthly meetings. This required a certain amount of personal expense to each of them inasmuch as they had to travel distances of thirty to seventy miles, as far away as Lincoln, Maine and Waterville, Maine, to attend these meetings for which they received no compensation. At these meetings the business operations of the cooperative were reported to the Directors, financial reports were submitted and general problems of business policy resolved by the Board of Directors.

Soon after the cooperative started business it became swamped with applications for membership and orders from stores all over the country. It became apparent that Mrs. Whitaker could not perform the functions satisfactorily of both general manager and treasurer. She resigned as treasurer and the Board of Directors filled this vacancy by electing the Chairman of the Board of Directors, Mrs. Ella Mae Banton, as treasurer. In the case of both persons who held this position, they were required by the Directors to be bonded in the amount of \$2,000.

About two hundred women finally joined the cooperative. One hundred sixty of which were from Maine and approximately forty were from outside the State of Maine. A person desiring to become a member of the cooperative would make inquiries of any of the officers or the Board of Directors, whereupon they would be sent a copy of the by-laws and an application blank. They were required to submit a sample of their knitting to the home office and to pay a membership fee of \$3.00. Upon receipt of the sample from a prospective member and the application blank properly executed by the applicant, Mrs. Whitaker as general

manager would either approve or disapprove the application. If the application was disapproved, the applicant had the right to appeal to the Board of Directors. All of the members have paid their respective membership fee and no knitted or crocheted products are sold for any one other than members. In other words the cooperative acts as a selling agent only for its members.

In October of 1957 a special meeting of the members was held at the Grange Hall in Troy, Maine where the Directors, officers and about forty members were in attendance. At this meeting reports of the business operation of the cooperative were given and the financial statement read to the members.

During the succeeding months financial problems arose which required the cooperative to obtain a bank loan in the amount of \$5,000 in the spring of 1958 which was used as operating capital. The cooperative gave its note to the lending bank. This note was personally endorsed by three of the directors and the vice-president, Mr. Jack Kennedy, who receives no salary or other compensation. In June of 1958, the annual membership meeting was held at Bangor, Maine, where again a report was given to the members by the cooperative's accountant, Francis Jacobs. At this meeting the members voted to amend certain of the by-laws and also voted to require an annual membership fee of \$3.00 and that payments to the membership be made every other month. A motion made at the June meeting to establish a cash reserve for the purpose of paying off back indebtedness was tabled.

It is interesting to note that at the first meeting of the associates in Waterville, Maine, the members voted to do certain things which were contrary to the advice of counsel then present. They adopted the name Whitaker House Cooperative, Inc. for example (DR 38).^{*} They also voted

^{*} Respondents' record appendix is referred to as DR—herein.

to change the proposed purposes which proposal would have limited them to making babies or infant's wear to the unlimited proposal finally adopted (DR 38). They also voted to establish a fifty-one per cent quorum requirement which has subsequently created no little difficulty.

The evidence reveals that the operating method of the cooperative can be briefly summarized as follows: A member makes any number of articles she desires and sends or takes them to the main office of the cooperative in Troy, Maine, whereupon a slip is made out in duplicate under the members name listing the articles submitted, the number and the amount of the advance allowance which the cooperative will pay to her whenever the items are sold by the cooperative. The articles then submitted are trimmed, tagged, boxed and shipped by employees of the cooperative who are paid a dollar an hour. Experience since the cooperative started shows that the inventory turnover takes about three months and that the members do not receive their advance allowance for several months after they are sent in to the cooperative.

The amounts which are paid to each member for goods (DR 39) submitted are determined by the Board of Directors after deducting the anticipated cost of overhead and sales. The directors attempt to divide the price charged to the retail stores so that twenty per cent will go to the sales force, twenty per cent for all other expenses and sixty per cent will go to the members. In actual practice the amount received by the members has equaled approximately fifty-seven per cent.

The cooperative has a sales agent who, as described above, receives a twenty per cent sales commission. The orders obtained by the sales force from the cooperative's retail customers come directly to the cooperative where the general manager prepares the order for shipment, ships them directly to the retail store and bills are sent by her

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directly to the retail store which again in return pays directly to the home office of the cooperative.

Members often call the home office of the cooperative in order to find out what items have been ordered in order that they may make things which they can expect to sell promptly through the cooperative. The designs or styles of the various items are made up by various members of the cooperative.

In the operation of the cooperative, which was organized as a non-profit organization, no one receives any profits from the sale of merchandise by the cooperative. There is no return on capital investment and the only entrepreneur profit that could be available would be the amounts which the members would receive in the event that excess receipts were distributed after the payment of sales and overhead expenses.¹

On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative, and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act. The basis of the holding is *completely* clear as the Circuit Court said in its opinion, (275 F. 2d at 363) "The parts of the record cited to us do not establish that the district court was clearly

¹ Events which have occurred since the day of the trial demonstrate even more fully the control of the cooperative by the members. They have cut costs by eliminating the salary of the president, discharging the accountant, cutting commissions to the sales force and by changing the method of packaging. They increased their income by raising the prices charged to the stores. On May 6, 1960 the home office of the cooperative was burned which resulted in a \$6,000 loss over and above the insurance carried on the inventory. This \$6,000 loss was not borne by Mrs. Whitaker, the president or the corporate entity known as the cooperative but by each individual member in proportion to her share of ownership in the entire inventory. All of this was done as a result of their own voting. These facts are recited to rebut the petitioner's claims on pages 12-13 of their brief, concerning the financial distress of the cooperative. The respondents contend this is irrelevant to the main issue.

erroneous in its finding that the cooperative was a bona fide cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a bona fide cooperative with control by the member-producers." (See also Petitioner's Appendix A, Page 35.)

Reasons For Not Granting The Writ

1. THE SUPREME COURT HAS PREVIOUSLY RENDERED A DECISION INVOLVING THE PRESENT ISSUE IN FAVOR OF THE RESPONDENTS.

This court denied the petition for writ of certiorari of L. Metcalf Walling, Administrator of the Wage and Hour Division, United States Department of Labor against Plymouth Manufacturing Corporation *Walling v. Plymouth Manufacturing Corporation*, 139 F. 2d 178 (7th Cir. 1943 cert, denied 322 U. S. 741 (1944)), and therefore has already considered the situation where, if work done by a partner of a partnership is rendered as a partner for the partnership and not as an employee of the partnership then the Act does not apply. A cooperative is often defined as an incorporated variation of a partnership. Even though the court in the *Walling v. Plymouth* case did not rule upon the exact issue as to whether partners are employees of a partnership, it is significant that no later cases are reported involving this same partnership or any other partnership

on this issue. It is perhaps even more significant that there does not seem to have been any great flood of partnerships in a wave of attempts by businesses to avoid the application of the Act in the wake of this case.

There is no likelihood that the country will be flooded with bona fide cooperatives to avoid the provisions of the Fair Labor Standards Act. Why, because it involves too much work with no entrepreneur profit. A businessman who might attempt it would soon find that he could not make a profit himself if he organizes a bona fide cooperative. If it is a "front" type cooperative then the Act would apply as it has for the last twenty-two years. The fact that the Act has been in effect this long without any true cooperatives being organized to avoid its application speaks louder than any argument the petitioner can put forth that the cooperative affords an easy means of vitiating the effect of the Act.

2. DECISIONS BELOW HAVE NOT ALTERED ESTABLISHED LAW.

The decision of the court below has in no way altered or changed the authority of prior rulings of this court or any other court as far as the meaning or the scope of the Fair Labor Standards Act in its coverage of homeworkers is concerned. Indeed, the District Court below had shortly before the hearing in the instant case rendered a decision which followed all of the previous rulings involving homeworkers. (*Mitchell v. Nutter* 161 F. Supp. 709, D. Maine.) This decision reviewed completely the long line of decisions involving the Act's coverage of homeworkers. It would be inconceivable that the court below should render a decision shortly afterwards which would change any of the effect of the prior ruling.

The court below examined the congressional history of the Act and found it "unenlightening. Specific Congres-

sional reference to cooperatives, in context, are directed solely to the applicability of the Act to persons who are "employees" of a cooperative in the sense concluded by *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755 (170 F. Supp. 743);" (R 96)

It is significant that the Court of Appeals involved here is the same court which rendered the opinion upon which the petitioner has so heavily relied throughout these entire proceedings, namely, *Fleming v. Palmer*, 123 F. 2d 749 (1st Cir. 1941), cert. denied, sub nom., *Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U. S. 662 (1942).

The Court of Appeals below distinguished its previous decision in *Palmer* on the grounds that the former decision did not involve "... a bona fide cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers." *Mitchell v. Whitaker House Coop. Inc.*, 275 F. 2d at 363.

The Court of Appeals also distinguished *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (4 Cir.), cert. denied 338 U. S. 900 (1949), and stated that "the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account." *Mitchell v. Whitaker Coop. Inc.*, supra. *McComb v. Homeworkers' Handicraft Corp.* was another case upon which the petitioner heavily relied in the courts below. The petitioner gains nothing by alleging that the court below did not consider these decisions, for it is quite apparent from the reading of both opinions below that the courts were very concerned about the importance of this litigation and were extremely careful

in their appraisal of the situation presented to them by this case.

Brandeis, J. long ago in *Liggett Co. v. Lee*, 288 U. S. 517, Page 579, stated, "Americans have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts—."

Let us look at a couple of hypothetical situations. There are a number of individual boat builders in Maine, highly skilled in their craft who make a wide variety of boats in about every price range. Let us assume that some of them realize that as individuals they are unable to compete with large mail order and wholesale concerns in the better market areas because as individuals they cannot afford to hire sales representatives nor can they as individuals meet the volume requirements of modern, metropolitan merchandising methods. These craftsmen then decide to establish a cooperative of boat builders which will provide them with a centralized office and display room and will provide a sales force for them. The individual boat builders send their boats in to the display room to be sold. The cooperative itself does not buy the boat. Query? Are these boat builders employees of their own cooperative? Even the petitioner should agree there is no employment relationship here. The petitioner would argue, of course, that the large investment of each builder in his tools and equipment together with other differences would enable them to avoid application of the Act.

Let us, then, take another example. Forget for the moment that those engaged in farming are exempt from the Act. Let us assume that a group of one hundred small potato share-cropping farmers get fed up with losing the middleman's profit on the sale of their potatoes. They organize a potato marketing cooperative. Let us also assume that they do not own the land on which their crops grow and they rent the equipment used to grow their crops. They elect four from among themselves to supervise the grading, packaging, storage and sale of potatoes and these four hire a professional potato wholesale manager. Can it be said that these farmers are employees of their own marketing cooperative?

The immediate reaction is, of course, they are not employees. This hypothetical situation is a far cry from the organization established in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755 (1949) where the farmers hired others to do the work for which their cooperative had been established. The warehouse workers and manager of our hypothetical case would be the type to be covered under the Farmers Reservoir decision.

3. LEGISLATIVE HISTORY NOT SIGNIFICANT

The respondents agree that the legislative history reveals many unsuccessful attempts to exempt homeworkers from the provisions of the Act. Respondents have not, do not and will not advocate exempting homeworkers from the provisions of the Act. However, the Act only applies to homeworkers who are *in fact employees*. The members of Whitaker House Cooperative say that they are not employees and do not need or want the protection of the Act. As the District Court said (R. 98) . . . "it is difficult to see how the homeworkers here involved require the protection of the Act, or that the Act should be applied to them. The

evidence discloses a marketing cooperative organized and operated by these ladies for the purpose of permitting them to sell to better advantage the products of their handicraft. In essence, the Cooperative exists to render services to its members; it receives the products produced by its members, sells the products for its members and distributes the net proceeds to its members as the articles submitted by them are sold. The record shows that the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear, and that they are so engaged for their own mutual benefit, and not as employees and employed by anyone. Their interests, as members and producers are identical. The work they perform is performed by them as members of the Cooperative, and not as its employees. Cf. *Walling v. Plymouth Mfg. Corp.*, 139 F. 2d 178 (7th Cir. 1943, cert. denied, 322 U. S. 741 (1944)).

"The 'economic reality' of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative 'suffer or permit' them to work. It has no connection with their labors. Rather, they, collectively, 'suffer or permit' themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers. The Congress may wish in its legislative wisdom to declare that they so employ themselves. But in the opinion of this Court, the Act as written does not now so provide. This Court will not judicially legislate, whether it be urged to do so by homeworkers as in *Mitchell v. Nutter*, *supra*, or as here, by the Department of Labor."

Conclusion

The way of industrial democracy, i.e. through cooperative organization, must not be closed by the indirect device of designating member-owners of a true cooperative employees of themselves under the Fair Labor Standards Act.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1960

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
 STATES DEPARTMENT OF LABOR, PETITIONER**

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
 APPEALS FOR THE FIRST CIRCUIT**

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER:

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 196-216) is reported at 170 F. Supp. 743. The opinions in the Court of Appeals (R. 217-225) are reported at 275 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1960 (R. 225). By orders of Mr. Justice Frankfurter, dated May 27, 1960 (R. 226) and June 29, 1960 (R. 227), the time for filing a petition for a writ of certiorari was extended to and including July 30, 1960. Certiorari was granted on October 12, 1960

(364 U.S. 861, R. 227). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the relationship between the "member-producer" homeworkers and the respondent cooperative and its managing officials is an employment relationship subject to the Act, or whether such a cooperative organization, if considered "bona fide," effectively converts the homeworkers into independent self-employed individuals so that the Act and its regulations restricting homework can be lawfully avoided.
2. Whether the respondent cooperative is a bona fide member-controlled cooperative organization.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) and the Regulations issued pursuant thereto are set forth in the Appendix, *infra*, pp. 59-67. The statutory provisions particularly involved are Sections 3(a), (d), (e), and (g) and Section 11(d), which read as follows:

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

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(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * *

(g) "Employ" includes to suffer or permit to work.

* * * *

SEC. 11.

* * * *

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

STATEMENT

This action was filed under Section 17 of the Fair Labor Standards Act to enjoin Whitaker House Cooperative, Inc., and respondents Whitaker and Bird, from violating the minimum wage, record-keeping, and shipping provisions of the Act (Sections 6, 11(c) and 15(a)(1)), and from failing to obtain special homemaker certificates for the women who make, in their homes, the goods in which the Cooperative deals—as required by the Wage Order for the Knitted Outerwear Industry, issued pursuant to old Section 8(f)

of the Act and Section 11(c), which order was continued in full force and effect by Section 11(d), added to the Act in 1949 (App., *infra*, pp. 60-63).¹

At a pre-trial conference, respondents conceded noncompliance with the Act's requirements in the respects charged in the complaint, as well as petitioner's right to an injunction against each of them, if the homeworkers involved in this action are "employees" within the Act (R. 197). At the beginning of the trial, respondents further conceded that if the workers in question are "employees," "it would necessarily follow that they are industrial homeworkers within the meaning of the Act and [the pertinent] regulations" (R. 27).

1. The Cooperative is primarily engaged in the production, sale, and distribution of articles of infants' knitwear, but it has recently added toys and women's capes and stoles to its line of merchandise (R. 106-107). All of these goods are made by homeworkers. The finishing work (trimming and packaging) is done by admitted employees of the Cooperative. Respondent Whitaker, the Cooperative's general manager, first entered the infants' knitwear business about 25 years ago (R. 198). In the beginning, she furnished the

¹ As originally filed, the complaint alleged similar violations on the part of Mrs. Whitaker during the period prior to July 17, 1957, when she operated the business in her own name (*i.e.*, before transferring it to Whitaker House Cooperative, Inc.) (R. 4). Later, however, by stipulation of the parties, the complaint was dismissed as to the violations during this earlier period (R. 197). The complaint was also dismissed against Mrs. Whitaker in her capacity as treasurer of Whitaker House Cooperative, Inc., it appearing that she had resigned from this position on October 10, 1957 (R. 205).

yarn out of which the homeworkers made the booties, caps and sacques, but some years ago, when she ceased operations for a while, she transferred her yarn business to a neighbor, Mrs. Pearl L. Nutter—the same Mrs. Nutter who was later enjoined by the trial court below (also Gignoux, D.J.) from violating the Act in the employment of homeworkers (R. 198, 199). See *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me.).

During the early years of her operations, Mrs. Whitaker disposed of her goods through various out-of-state concerns, including the Edward S. Wagner Company which also employed homeworkers and was subsequently enjoined from doing so (R. 198).² After she resumed operations about five years ago (*ibid.*), Mrs. Whitaker began selling some of her goods to or through Mrs. Doris Law (R. 62, 75) who operated a similar business in Tennessee until she was enjoined from employing homeworkers in violation of the Act, in June 1957 (R. 206).³

During the period immediately prior to the formation of the Cooperative, Mrs. Whitaker had approximately 163 homeworkers (R. 198–199), who knitted or crocheted articles of infants' wear for her in their homes. At her own home in Troy, Maine, Mrs. Whitaker employed a helper to trim the garments and to assemble them in sets (*ibid.*). She did not furnish the yarn during this period, and the homeworkers ob-

² See *McComb v. Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y., 1950), reversed on other grounds, *sub nom. Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2), and *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964. See also *infra*, pp. 36–37.

³ See *Mitchell v. Law*, 161 F. Supp. 795 (W.D. Tenn.).

tained it from a Mrs. Fannie Johnson, of Unity, Maine (R. 37), who later joined the Cooperative (R. 20, 120). Mrs. Whitaker, however, set the price which she would pay for the garments on a piece-rate basis (R. 199). In addition, she would show the women "samples of the sort of things" she wanted (R. 24), and tell them the designs and colors to use (R. 33). If their work was unsatisfactory, she would reject it (R. 34) and tell them how it could be improved, and the homeworkers followed her instructions to the extent that they were capable (R. 36). As the trial court expressly found, "the relationship between Mrs. Whitaker and these homeworkers was substantially identical to that between Mrs. Nutter and her homeworkers, which this Court described at length, and held to be an employment relationship within the Fair Labor Standards Act, in *Mitchell v. Nutter*, 161 F. Supp. 799 (D. Me.). There can be no question that if Mrs. Whitaker were presently operating as previously, her operations would fall within the scope of *Nutter*, and an injunction should issue" (R. 199). The Wage and Hour Division of the Department of Labor had formally so advised Mrs. Whitaker in January, 1957 (R. 199), and it was following this advice that respondent Whitaker House Cooperative, Inc., was formed.

2. It is not disputed, and the trial court found, that Mrs. Whitaker and her attorney, respondent Bird, "actively participated in the organization of the Cooperative for the express purpose of attempting to avoid application of the Fair Labor Standards Act to the homeworkers here involved" (R. 209).

Formation of the Cooperative was begun by calling a meeting of "all the homeworkers who are interested in establishing a cooperative" (R. 192, 200). This was done by a form letter prepared by Mrs. Whitaker's attorney (R. 190-192). The letter assured the homeworkers that a cooperative "would enable them to comply with the Federal Laws concerning wage and hour regulations" (R. 191). It further stated that a cooperative would not only enable the workers to continue to make products in their homes, but would also "increase the uniformity of [the] products" and benefit the workers by "enabl[ing] them to purchase supplies at wholesale prices" (*ibid.*).

The organizational meeting was held in Waterville, Maine, on July 9, 1957 (R. 200-201). Mr. Bird presided and it was attended by Mrs. Whitaker and approximately 40 of the women who had made articles of infants' wear for Mrs. Whitaker (*ibid.*). Bird, Mrs. Whitaker, and 26 of the women present signed the original articles of association and approved the by-laws, which had been prepared in advance by Bird (R. 201). Two of the women had also worked for Mrs. Whitaker as trimmers (R. 202). These two trimmers and three of the homeworkers were made directors of the new enterprise (*ibid.*). Mrs. Whitaker's attorney (respondent Bird) became president; a cousin of her husband, John P. Kennedy, became vice-president (*ibid.*); and Mrs. Whitaker herself was made general manager (R. 46, 205), as well as secretary-treasurer (R. 202). The final formality of filing a copy of the Cooperative's Certificate of Organization with Maine's Secretary of State was

accomplished on July 18, 1957, whereupon Mrs. Whitaker ceased operating on her own, and transferred her business to the Cooperative "[l]ock, stock, and barrel" (R. 45, 48, 203).⁴

The by-laws state that the objective of the Cooperative is to promote the "economic welfare of members" (R. 151) and provide that "All persons, including married women and minors, firms and corporations shall be eligible for membership" (Art. 6, Sec. 1; R. 153). Homeworker-applicants for membership are required to buy from the Cooperative a sample "of the work that they are to do" (R. 138), to copy the sample, and then to submit the copy to the Cooperative (R. 162). If the work is found to be satisfactory, the applicant becomes a member upon purchasing a membership interest for \$3.00 and agreeing to comply with the articles of incorporation and the by-laws (*ibid.*).

The by-laws, among other things, prohibit members from furnishing to other businesses knitted articles of the type ~~dealt in~~ by the Cooperative (Art. 13, Sec. 3; R. 161) and require that members remain such for at least a year (Art. 6, Sec. 6; R. 154). Members, however, may be "expelled" sooner for violation of any rules or regulations or if their work is substandard (which has been the reason assigned for "expelling" at least three members) (R. 174).

⁴ The Cooperative was chartered as a corporation under Maine's Consumer's Cooperative Act (R.S. Me., 1954, c. 56), but, as respondents have conceded, there is a serious question as to its legality since that Act contains no provision for the organization of a merchandising cooperative such as here involved (R. 210).

The financial interest of the members is meager. A membership interest costs only \$3.00, and the by-laws specifically provide that "No member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (Art. 4, Sec. 2; R. 152).

The members have little or no entrepreneurial skill,⁵ and their participation in the control of the Cooperative is as slight as their financial interest. Two membership meetings have been held since the Cooperative was organized in July 1957, but neither meeting had a quorum which, under the by-laws, is 51 percent of the members (R. 154). At the special meeting held in October 1957, only 41 out of 172 members were present (R. 122-123). At the annual meeting held in June 1958 (R. 73), the Cooperative had 195 members, but, only 37 attended the meeting (R. 69). Neither meeting was adjourned for lack of a quorum, as the by-laws provide (see Article 7, Section 5; R. 154-155), and at the June 1958 meeting the 37 members in attendance proceeded to "amend" the by-laws "so that 25 members constitute a quorum" (R. 182) and then "elected" officers and directors for the ensuing year (R. 182-183).

Under the by-laws, management of the Cooperative is vested in its Board of Directors and general man-

⁵ The Cooperative's accountant made this clear when he stated that "after the Cooperative gained momentum [during the fall, the late fall], the members sent in material in tremendous quantities, not being aware—after all, they have no reason to be aware—that the big season for the Christmas merchandise * * * is not just before Christmas but is back in August and September * * *" (R. 149).

ager (R. 204). The three most faithful members of the Board are Mrs. Leavitt and Mrs. Edmonds, both of whom had previously worked for respondent Mrs. Whitaker as trimmers (R. 202), and Mrs. Ella Banton (a former homeworker for Mrs. Whitaker) who now serves as the Treasurer (R. 135).⁶ Between the monthly meetings of the Board, Mrs. Whitaker is in full charge of the Cooperative (R. 73). Although the by-laws provide that the manager is to run the business subject "to the direction, management and control of the Board of Directors". (R. 159), Mrs. Whitaker testified that she has "no particular way of knowing the actual contents of the records of the [Board's] meeting[s]" (R. 103); that she has never bothered to read through all the minutes (*ibid.*); and that she frequently leaves the meetings after giving her report on the affairs of the Cooperative (R. 206).

Except for changes necessitated by the new form of operating, the business is conducted in much the same way that it was conducted by Mrs. Whitaker prior to formation of the cooperative. Operations are still conducted from Mrs. Whitaker's home, and she, as general manager, still receives the articles sent in or delivered to her home by the workers (R. 205). The articles are still unfinished (R. 126) and must be trimmed and packaged (R. 55). The homeworkers are still paid on a piece-rate basis, the rates having been

⁶Mrs. Banton was "appointed" Treasurer by the Board of Directors when Mrs. Whitaker resigned as such (R. 172), although the by-laws provide that officers shall be elected by the members (Art. 10, Sec. 1; R. 158).

established by "management with the consent of the Board of Directors" (Whitaker Cooperative's answer to plaintiff's Interrogatory No. 9; R. 9);⁷ and the homeworkers are still told what to make, the colors desired, and the designs to be followed (R. 60). As Mrs. Whitaker explained, "we couldn't work any other way" (*ibid.*).

As pointed out *supra*, pp. 5-6, when Mrs. Whitaker operated the business in her own name, the homeworkers bought their yarn from Mrs. Fannie Johnson of Unity, Maine. It appears that they still get yarn from Mrs. Johnson (R. 120), and that she, too, has joined the new enterprise (*ibid.*). Mrs. Doris Law, who used to deal with Mrs. Whitaker before her operations in Tennessee were enjoined (see *supra*, p. 5), has also joined the new enterprise. She is the Cooperative's "exclusive sales" agent (R. 206) and has been such almost from the beginning (R. 170).

Since the advent of Mrs. Law, the Cooperative has grown in membership. It now has some 200 members, many of whom live in Tennessee (R. 17-23).⁸ It has also expanded its line of merchandise to include toys and women's capes and stoles (R. 106-107). Still further expansion is expected, if respondents should pre-

⁷ The piece rates are now referred to as "advance allowance[s]" (R. 9). They are, however, definite amounts (see schedule of rates, R. 12-13), and the homeworkers expect to be, and are, in fact, paid on the basis of such rates (R. 125, 129, 130).

⁸ The names of the Tennessee members are, in many instances, identical to those of Mrs. Law's homeworkers as set forth in *Mitchell v. Law*, *supra*, p. 5, fn. 3, or so similar as to suggest they are the same persons.

vail in this litigation;* and the by-laws and charter are broad enough to permit this. The by-laws do not limit membership to residents of the New England states or Tennessee, and the Cooperative now has members in eleven different states (R. 17-23). Nor does the Cooperative's charter restrict production to articles of infants' wear. On the contrary, as the trial court noted, the charter states that the purposes of the Cooperative "shall be, among others, 'to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail'" (R. 203).

Despite the Cooperative's growth and expansion, it has not yet been a financial success. This is because its operating expenses, particularly the salaries fixed for respondents Whitaker and Bird and the 20 percent sales commission for Mrs. Law (the exclusive sales agent), are such that the Cooperative "could survive as a financially solvent enterprise only by doubling its present gross income" (R. 208). Even then the homeworkers would apparently still be receiving the same substandard rates that they are now being paid, with little or no hope of receiving any-

* While respondents' accountant was being questioned about the financial condition of the Cooperative and its prospects for the future, he said: "What is expected is that if fortunately for them the Cooperative and its officers should prevail in this action, they will be swamped with business. Many people, there is no question, are waiting to see how this comes out and who have said they won't send anything into the Cooperative until they know that the Cooperative is going on * * *" (R. 151).

thing additional by way of dividends. The Cooperative's accountant testified, "If the business were approximately doubled and ran shall we say from \$85,000 to \$90,000 gross sales, the ratio of commissions and payments to members would be unchanged" (R. 148). While he stated that the "remainder which would be left * * * would be sufficiently large so that something at [the Cooperative's then] general level of overhead could be carried" (*ibid.*), the Cooperative's outstanding debts would have to be paid before there would be any excess receipts for distribution to the members. As of September 4, 1958, the Cooperative was indebted to Mrs. Whitaker in the amount of \$7,908 for back salary and inventory (R. 193). It was also behind in respondent Bird's salary to the extent of \$1,200, and owed commissions to Mrs. Law in the amount of \$2,550 (*ibid.*).

3. On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative,¹⁰ and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act (R. 209, 215). The basis of the holding is not entirely clear. At one point, the court expressed the view that "the members are engaged, through the Cooperative, in a joint venture" (R. 215), thus indicating that it may have considered the Cooperative

¹⁰ While we believe this finding is clearly erroneous, we did not directly challenge it in the petition because we think, as Judge Aldrich did, that "the matter lies deeper than this" (R. 223). However, in our petition, we reserved the right to question the correctness of the finding that the Cooperative is a "bona fide" member-controlled organization, if certiorari was granted. See Point II, *infra*, pp. 46-57.

and its members to constitute a single entity. At another point, however, the court seems to have recognized that the Cooperative was a separate entity from its members. "It," said the trial court, "has no connection with their labors. Rather, they [the members], collectively, 'suffer or permit' themselves individually to work" (R. 215).

The Court of Appeals affirmed, with Judge Aldrich dissenting (R. 222-225), and with the two majority judges (Chief Judge Woodbury and Judge Hartigan) each writing a separate opinion (R. 217-222). In his opinion, Judge Hartigan expressed the view that the "members of the cooperative individually are the producers of the goods in which the cooperative deals" and agreed with the trial court's position that "[w]here the items produced by the members are the units used for measuring each member's share in the cooperative's net income," "[t]heir interests as members and producers are identical" (R. 221). In his concurring opinion, Chief Judge Woodbury referred to the Cooperative as a "bona fide organization" engaged simply in "the business of marketing such of the products of its producer-members as they may see fit to submit to it for sale"—i.e., a mere "sales agency for its producer-members" (R. 222).

Judge Aldrich dissented on the ground that, not only are many of the homeworkers necessarily "inactive members" exercising no control over the Cooperative, and "differ[ing] in no respect from employees of any homework employer", but also that the Cooperative "constitutes an independent entity within the meaning of the Act, whether it be re-

garded as a corporation, or as an 'organized group of persons' " (Section 3(a), *supra*, p. 2), and that "[i]n the truest sense Cooperative 'suffer[s] or permit[s]' these ladies to work" (R. 223). "If," said Judge Aldrich, "the thought is that Cooperative is simply a selling organization * * * it is no more a sales organization than is any other employer of homeworkers whose amount of production is self-controlled (but who were restricted to selling to it)" (*ibid.*). The fact that members may exercise a voice or acquire stock in a corporate entity, Judge Aldrich pointed out, clearly does not preclude their being its employees, particularly "in terms of the philosophy of [this] Act," which is concerned not merely with the protection of particular workers who require its protection but also with fairness to "competing * * * other producers who must, perforce, respect the standards of the Act" (R. 224).

SUMMARY OF ARGUMENT

I

The homeworke-members of respondent Cooperative are employees (subject to the Fair Labor Standards Act) of the Cooperative or of its managers, whether or not the Cooperative is a bona fide member-controlled organization.

It is well-settled, as both courts below recognized, that "homeworkers generally are included in the statutory definition of 'employee' " of the Fair Labor Standards Act, and that the Act's application to them may not be circumvented by the particular legal labels attached by the parties to their relationship.

Walling v. American Needlecrafts, Inc., 139 F. 2d 60, 64 (C.A. 6); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, n. 8. The decision below mistakenly rests upon technical labels and concepts and isolated factors, to the exclusion of this Act's own broad definition of the persons and working relationships within its coverage. The application of such "comprehensive" statutory definitions is "not confined to * * * the technical and traditional concepts" or the contractual "labels" which the parties may attach to their relationship, but must be given a practical construction to include "workers who [are] such as a matter of economic reality," in the light of "the policy and purposes of the Act, the circumstances and background of particular employment relationships," and "the circumstances of the whole activity" rather than "isolated factors." (*United States v. Silk*, 331 U.S. 704, 713).

Judged by these well-settled criteria, every relevant consideration dictates the conclusion that the homeworkers here are respondent Cooperative's employees under this Act—if not, indeed, even under conventional standards of employment relationship. Among the most relevant—and, we submit, decisive—statutory and economic factors are the following:

A. The pre-1938 homework problems in the particular industries here involved exemplify the serious kind of substandard labor conditions and resultant unfair competition which the enactment of this Act aimed to correct. The two industries immediately concerned—knitted and crocheted infants' wear and women's knitted outerwear—were at that time fore-

most among those in which homework was prevalent and the wage and hour standards notoriously the lowest. The correction of the serious homeworker problem in these industries was one of the first tasks undertaken upon the passage of the Act because of an immediate large-scale plan to avoid the Act's application by a contractual arrangement designating the homeworkers as independent "manufacturers." This serious threat to the Act's enforcement, which was averted by the entry of a consent decree in November, 1939 (*i.e.* near the close of the first year of the Act's operation), has, throughout the ensuing 20 years, been kept under control by the consistent judicial condemnation of similar devices (prior to the decision in the instant case), bolstered by legislative confirmation of the administrative and judicial rulings.

B. The admitted facts in this record reveal the Cooperative to be a legal entity separate from its individual members, retaining in its managing officials a degree of control more than sufficient to qualify as the homeworkers' employer under this Act. The reasoning of the court below that the work performed by producer-members of the Cooperative is not performed as employment because "[t]heir interests as members and producers are identical" (R. 221), is inconsistent with this Court's decisions that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co. v. McComb*, 337 U.S.

755, 768; *Boutell v. Walling*, 327 U.S. 463, 468, see also *Schenley Corp. v. United States*, 326 U.S. 432, 437. Even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity—particularly in the light of the social philosophy of this Act. The Cooperative was not a mere agent for the members in selling their wares; it controlled the activities of the members and was itself the principal responsible to third parties for all business transactions.

C. The decision below would vitiate the corrective effect of the judicial precedents which have heretofore uniformly sustained the Act's application to homeworkers, including this very class of homeworkers. The record shows that these homeworkers are no more truly independent manufacturers or contractors than were the workers under the various plans previously held ineffective to avoid the Act.

D. The Act's coverage of these homeworkers has been confirmed by long-continued legislative approval. In 1949 Congress enacted Section 11(d) which explicitly ratified administrative homework regulations and authorized the administrative restriction or prohibition of homework (*supra*, p. 3). That Congress and every Congress since 1949 have rejected proposed amendments to exempt the class of rural homeworkers involved in this case.

E. The far-reaching impact of this Cooperative on the homeworker problem generally is an economic reality of great relevance. Under the Cooperative's

charter, and under its admitted plans and expectations, its membership and operations can be expanded so as to bring about widespread revival of the serious homework problem not only in the industries immediately involved in this case, but also in other industries in which substandard wage and hour conditions have been aggravated by oppressive child labor—notably in the embroideries industry (see *Gemsco, Inc. v. Walling*, 324 U.S. 244). The charter of the Cooperative explicitly includes in its purposes the manufacture of “embroidered goods of all kinds” (R. 163) and makes “all persons, including married women and minors * * * eligible for membership” (R. 153, emphasis added). That the threat of such a general revival of the homework problem is not merely a theoretical possibility, but a real prospect, is evidenced by the avoidance practices attempted in the embroideries and many other industries since the enactment of this Act, as well as by the expansion of this Cooperative’s membership and activities which had already occurred at the time of the trial.

II

Even assuming that the Act’s application to homeworkers may be lawfully avoided by a bona fide member-controlled cooperative, the ruling below that Whitaker House Cooperative is such an organization is clearly erroneous. The Cooperative’s by-laws, minutes and other documentary evidence, as well as the uncontradicted testimony of Mrs. Whitaker and of the Cooperative’s other officers, strikingly parallel the evidence on which the First Circuit predicated

its reversal of the district court's comparable finding of a member-controlled cooperative in *Fleming v. Palmer*, 123 F. 2d 749, certiorari denied, 316 U.S. 662. Here, no less than in *Palmer*, the evidence considered as a whole, compels a finding that this cooperative is not a bona fide member-controlled organization—at least not in any sense relevant to the coverage of this Act. It follows that Mrs. Whitaker remained the employer.

ARGUMENT

I-

THE HOMEWORKER MEMBERS OF WHITAKER HOUSE COOPERATIVE ARE "EMPLOYEES" SUBJECT TO THE FAIR LABOR STANDARDS ACT, WHETHER OR NOT THE COOPERATIVE IS A "BONA FIDE" ORGANIZATION

Introduction

The government's primary position is that, even if the respondent Cooperative be viewed as a bona fide member-controlled cooperative, the homeworkers in this case were employees of the Cooperative or possibly of the Cooperative's managers. We believe that this conclusion follows directly from the principles applicable to the coverage of the Fair Labor Standards Act, taken together with the undisputed facts in this case as to the relationship of the workers with the Cooperative and its managers. Before discussing the particulars of the case, we set forth the general doctrines governing the determination, under this Act, of the employer-employee relationship.

It is well-settled, as both courts below recognized, that "homeworkers generally are included in the statutory definition of 'employee'" of the Fair Labor Standards Act, and that the Act's application to them may not be circumvented by the particular legal labels attached by the parties, if the employment relationship contemplated by the Act actually exists. *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60, 64 (C.A. 6); *Walling v. Twyeffort, Inc.*, 158 F. 2d 944, 947 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785; *Fleming v. Palmer*, 123 F. 2d 749, (C.A. 1), certiorari denied *sub nom. Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662; *Gemsco, Inc. v. Walling*, 324 U.S. 244, 251-252, 257, 259, n. 23; *United States v. Rosenwasser*, 323 U.S. 360, 363, n. 4; and the numerous other homemaker decisions cited *infra*, p. 29, fn. 16. See also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, n. 8, citing with approval the *Twyeffort* and *American Needlecrafts* decisions, *supra*.

The decision below is the first court of appeals ruling in the 22 years of the Act's operation to hold that application of the Act to homeworkers may be lawfully avoided by a contractual arrangement or organization purporting to convert them into independent self-employed individuals. In our view, the First Circuit has overlooked, not only the broad language Congress used in defining "employee," "employer" and "employ," but also the underlying social and economic reasons for the Act's coverage of homeworkers (including the notoriously low standards for homework in the particular industries here involved—the knitted, crocheted and embroidered wear indus-

tries, see *Gemsco, supra*, and the discussion, *infra*, pp. 25 ff.). Such frustration of the statutory purpose to cover these homeworkers is no more warranted by the cooperative arrangement here (whether bona fide or not¹¹) than by the series of previously rejected avoidance arrangements (see *infra*, pp. 28-29, 36-38).

In formulating its definitions of the employer-employee relationship, Congress used the broadest possible terms. "Employ" is to be read as *including* to "suffer or permit to work"; "[e]mployee" *includes any individual* employed by an employer; "[e]mployer" *includes any person* acting directly or indirectly in the interest of the employer in relation to an employee"; and, finally "person" covers not only the usual categories but also "any organized group of persons" (emphasis added). See *supra*, pp. 2-3. The decision of the majority below gives inadequate scope to these all-inclusive words, and likewise reflects a disregard of the economic and statutory considerations which this Court has laid down for determining whether an employment relationship exists under this Act and similar "social legislation of the 1930's," of which "the Fair Labor Standards Act * * * is a part." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723. These criteria require that the incidents of the homeworkers' relationship to the cooperative organization in the instant case be judged by the "comprehensive" statutory definitions of employment so as to accomplish the broad ameliorative Congressional pur-

¹¹ See Point II, *infra*, pp. 46-57, for our argument that the Cooperative is not, in fact, a bona fide member-controlled organization.

poses, and that the determination be made "upon the circumstances of the whole activity," not upon "isolated factors" nor upon the particular legal "label" attached by the parties—such as "independent contractor" or "cooperator." See *Rutherford*, 331 U.S. at 729-730; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-151; *United States v. Rosenwasser*, 323 U.S. 360, 362; *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111; *United States v. Silk*, 331 U.S. 704; *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U.S. 398; *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (dissent).¹²

While there is "no definition that solves problems as to the limits of the employer-employee relationship" under this or similar legislation (*Rutherford*, at 728), the broad statutory definitions of this Act—"[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame", *Rosenwasser*, 232 U.S. at 362—are not to be summarily dismissed as "hardly helpful" (see opinion below, R. 212). The court's negative view of the legislative definitions also misled it into disregarding the fundamental criteria laid down by this Court. The Court has ruled, for instance, that the terms "employee" and "employer" as defined in such legislation are "not confined to * * * the technical and traditional concepts," but carry with them "the more

¹² As stated by Mr. Justice Frankfurter in *Powell*, *supra*: "Our decisions have made one thing clear about the Fair Labor Standards Act: its applicability is not fixed by labels that parties may attach to their relationship nor by common law categories nor by classifications under other statutes" (citing the *Rutherford* and *Portland Terminal* decisions, *supra*).

relevant economic and statutory considerations" (*Atkins, supra*, at 403); they are "to be construed 'in the light of the mischief to be corrected and the end to be attained'" and "as a matter of economic reality" (*Silk, supra*, at 713) with "an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by [the] statute", "draw[ing] substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life" (*Atkins*, at 403); and, while Congress may not have "intended to change normal business relationships," through which "a part of [the] industrial process is in the hands of independent contractors" (*Silk*, at 714), where "the work done, in its essence, follows the usual path of an employee," the Act's application is not defeated by the "label" which the parties attach to their relationship (*Rutherford*, at 729) or by "adroit schemes * * * to avoid the immediate burdens at the expense of the benefits sought by the legislation" (*Silk*, at 712).¹³

Judged by these criteria—and indeed even by more conventional technical standards—the status of the respondent Cooperative as a separate legal entity, together with the degree of control retained in the

¹³ The application of these criteria to the status of homeworkers under this Act was specifically recognized by this Court's citation in support of its decision in *Rutherford* (*supra*, at 729, n. 8) of the homemaker decisions of the Sixth and Second Courts of Appeal in *American Needlecrafts* and *Twyeffort, supra* (discussed *infra*, pp. 36-38), and apparently also by the denial of certiorari in *Twyeffort* on the same date (331 U.S. 851).

Coöperative's management over the working conditions of these homeworkers, are clearly sufficient to qualify them as employees of respondent Cooperative, or of the Cooperative's managers, under the Act. The homeworkers' meager interests as members of the Cooperative are in no way inconsistent with their status as such employees, which the admitted facts in this record demonstrate has not been truly altered by the cooperative arrangement, any more than by the various devices previously outlawed.

A. The background and circumstances of the homework problem in the particular industries here involved

The substandard labor conditions and unfair competition, which the enactment of the Fair Labor Standards Act aimed to correct or eliminate, were notoriously prevalent among the homeworkers in the particular industries immediately affected by the instant case—i.e., the infants' knitted and crocheted wear and women's knitted outerwear industries. These two industries, at the adoption of the Act, were foremost among those whose labor standards were plagued by a serious homeworker problem (see *Industrial Homework Under the National Recovery Administration*, United States Department of Labor, Children's Bureau, Publication No. 234, pp. 21-32). At the time of the N.R.A. study, in 1936, there were reported to be some 17,000 homeworkers, located in 29 states, being utilized in the knitted outerwear industry, large numbers of whom had been recruited in small towns and rural districts by New York manufacturers and dis-

tributors in order to be free from the New York homework law prohibiting work on infants' clothing in tenements (*id.* at 24-25). The homeworkers in the infants' wear branch were the lowest paid in any of the 28 industries then using substantial numbers of homeworkers (*id.* at 2, 28), two-thirds earning less than 5 cents an hour and almost one-half earning no more than 3 cents an hour (*id.* at 13, 17, 28).¹⁴ In the women's knitted garment branch, although the earnings were not quite so low (but only a few of the most skilled earned as much as 15 cents an hour), the evil of excessively long working hours was most prevalent, "a working week of 50, 60, and even 70 hours [being] not uncommon" (*id.*, 40).

Upon enactment of the Fair Labor Standards Act, the significance of the homeworker problem to the enforcement of the statutory minimum labor standards in the knitted outerwear industry (including the infants' wear industry) was at once apparent. During the first year of the Act's operation, the Administrator was confronted with a large-scale overt plan, on the part of the principal manufacturers and distributors

¹⁴ The present earnings of these homeworkers are still pitifully low, ranging "between 16 and 23 cents" an hour, according to the findings of the court in *Mitchell v. Law*, 161 F. Supp. 795, 797 (W.D. Tenn.). As pointed out in fn. 8, *supra*, p. 11, many of Mrs. Law's homeworkers are now members of Whitaker House Cooperative. Their hourly earnings, as determined by the court in *Law, supra*, were for booties for which they received 70 cents a pair (161 F. Supp. 797) or \$8.40 a dozen. Whitaker House Cooperative has 33 styles of booties, and the highest rate per dozen for any style, except Style 40, is \$8.00 (R. 12-13). Most of the booties rates are \$5.50, \$6.00, \$6.50 or \$7.50 per dozen (*ibid.*).

in the knitted outerwear industry, to avoid the Act's application to homeworkers by a so-called "purchase and sale" arrangement whereby the homeworkers were designated as "manufacturers" and any employment relationship was explicitly disclaimed. This serious threat to the enforcement of the Act in the industry which employed the lowest paid homeworkers was forestalled, and the problem had been largely resolved by the end of the first year of the Act's operation, by a consent decree issued November 21, 1939, enjoining the 11 principal manufacturers and distributors in this industry from paying any of their homeworkers less than the minimum wage or employing them for longer hours without paying statutory overtime, and, also, specifically, "[f]rom using or adopting any scheme or device, or taking any action directly or indirectly, to evade the provisions of the Act or of this judgment, and in particular but without limiting the generality hereof, from using or adopting any scheme or device involving so-called purchase and sale arrangements with any homeworkers or other employees." *Jacobs v. Hand Knitcraft Institute et al.*, Civil No. 6-354 (S.D. N.Y.), not officially reported, 2 Labor Cases (CCH) para. 18,478, page 145.¹⁵

¹⁵ The effort to avoid the impact of statutory requirements is an old story in the history of remedial legislation regulating employment of workers—a history replete with various methods (by way of independent contractors, corporate forms, partnerships, leases and cooperatives) designed to avoid responsibility under such regulatory statutes. Long prior to the enactment of this Act, the courts had considered and struck down a variety of arrangements which, like the cooperative arrangement here, were aimed to avoid the requirements of social legislation. A

This consent decree was supplemented by inclusion in the Knitted Outerwear Wage Order, issued April 3, 1942, of a prohibition of homework in the industry except by persons who obtained special homework certificates issued pursuant to regulations of the Wage and Hour Division of the Labor Department (*supra*, pp. 3-4; *infra*, pp. 60-67; 7 Federal Register 2592, April 4, 1942, subsequently codified, as amended, in 29 C.F.R., Part 530). These regulations were identical with those issued in connection with the Wage Order for the Embroideries Industry, the validity of which was sustained by the Court in *Gemsco, Inc. v. Walling*, 324 U.S. 244, *supra*. There was explicit legislative ratification of these regulations by the enactment of Section 11(d), *supra*, p. 3, in the 1949 Amendments to the Act. During the 18 years since the effective date of the Knitted Outerwear Wage Order restriction on homework, there have been several sporadic attempts (by firms or persons not enjoined by the above consent decree) to avoid or evade the application of the Act and the regulations, but the

particularly instructive opinion by a New York state court on this subject, with specific reference to homeworkers in the infants' knitwear industry, may be found in *People v. Famous Infants' Knitwear Corp.*, 172 Misc. 842, 18 N.Y.S. 2d 167, 169 (Ct. Spec. Sess., N.Y. City, 1939), involving "independent contractor" homeworkers:

The subterfuge created here is new to the law covering industrial homework. * * * Devious methods to evade the law, however, are not new to this court.

The Workmen's Compensation Law has had its formative years replete with partnership and lease evasions. The courts have uniformly stated that evasion of that law by scheme or device would not be countenanced. [Citing cases.]

consistent judicial condemnation of these attempts,¹⁶ bolstered by the explicit legislative approval in 1949 of the homework restrictions and repeated legislative refusal to enact proposals to exempt rural homeworkers from the requirements of the Act (*infra*, pp.

¹⁶ For decisions in the infants' knitwear industry alone² (in addition to the above-cited *Hand Knitcraft Institute* consent decree), see *McComb v. Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y.), affirmed in part and reversed in part, *Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2); *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D.N.Y.), affirmed, *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964; *Harwood v. Tobin*, 194 F. 2d 538 (C.A. 6), affirming *Tobin v. Harwood*, 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.); *Mitchell v. Law*, 161 F. Supp. 795 (W.D. Tenn.).

For decisions of Courts of Appeals in relation to other industries, see *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60 (C.A. 6) (embroideries industry); *Fleming v. Palmer*, 123 F. 2d 749 (C.A. 1), certiorari denied, 316 U.S. 662 (embroideries industry); *Walling v. Twyeffort, Inc.*, 158 F. 2d 944 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785 (garment industry); *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900 (bag manufacturing industry).

The district court decisions involving homeworkers in such other industries are legion. See *Walling v. Wolff*, 63 F. Supp. 605 (E.D.N.Y.) (embroideries industry); *Walling v. Frank*, 62 F. Supp. 261 (W.D. Ky.); *Walling v. F. L. Dunne Co.*, 7 WH Cases 317 (D. Mass.), 13 Labor Cases (CCH) para. 64, 045; *Walling v. Malouf*, 7 WH Cases 1068 (S.D. Calif.), 12 Labor Cases (CCH) para. 63, 740 (garment industry); *Mitchell v. Roberts*, 179 F. Supp. 247 (S.D. Calif.); *Mitchell v. American Republic Ins. Co.*, 151 F. Supp. 529 (S.D. Iowa); *Durkin v. Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Walling v. Siering*, 5 WH Cases, 1009 (N.D. Ill.), 11 Labor Cases (CCH) para. 63, 098 (direct mail advertising industry); *Mitchell v. Northwestern Kite Co.*, 130 F. Supp. 835 (D. Minn.); *Walling v. Hastings*, 6 WH Cases 554 (S.D. Ind.), 11 Labor Cases (CCH)

40-43), has thus far prevented the revival of a serious homeworker problem in this and other industries.

B. *The record reveals the respondent Cooperative to be a legal entity separate from its individual members, retaining in its managing officials a degree of control more than sufficient to qualify as the homeworkers' employer under the Act*

The incorporation of the respondent Cooperative as a legal entity and business organization separate from its members, with substantial retention of control in a few managing officials, should be considered sufficient, even by common law standards, to classify the Cooperative as the homeworkers' employer under the Act. The reasoning of the court below that the work done by the producer-members of the Cooperative is not performed as employment because "[t]heir interests as members and producers are identical" (R. 221), is inconsistent with this Court's decisions holding that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co. v. McComb*, 337 U.S. 755, 768; *Boutell v. Walling*, 327 U.S. 463, para. 63,485; *Nelson v. Kuepper Favor Co.*, 1 WH Cases 854 (N.D. Ill.) (novelty manufacturing industry); *Walling v. Freidlin*, 66 F. Supp. 710 (M.D. Pa.) (rug industry); *Fleming v. Demeritt Co.*, 56 F. Supp. 376 (D. Vt.) (clothespin manufacturing industry); *Mason v. T. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S.D.N.Y.) (optical industry); see also *Mitchell v. Sulahian* (D. Mass., Dec. 7, 1960), 14 WH Cases 840 (novelties and dolls).

468, see also *National Labor Relations Board v. Milk Producers Assn.* (C.A. 10, decided Nov. 12, 1960), 47 LRRM 2294; *Schenley Corp. v. United States*, 326 U.S. 432, 437. As pointed out in Judge Aldrich's dissent (R. 224), even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity, particularly in the light of the social philosophy of this Act.

Not only does the statutory definition of "employer" include "any person acting directly or indirectly in the interest of an employer", defining "person" to mean "individual, partnership, association, corporation * * * or any organized group of persons" (Sections 3(a) and (d), emphasis added, *supra* pp. 2-3), but the legislative history confirms the Congressional intent to include cooperatives within the scope of the Act.¹⁷ The majority below, however, found neither the Act's broad definitions of employment nor this Court's decision in *Farmers Irrigation* to be "helpful" (R. 220). *Farmers Irrigation* was brushed aside because it "did not involve the question whether member-producers of a cooperative are

¹⁷ In the earliest discussions of the legislation it was specifically pointed out that the general statutory language would apply to cooperative organizations unless specific exemptions were framed to exclude them. See 81 Cong. Rec. 7873, 7876, 7927. An amendment exempting specified cooperative associations was introduced by Senator Borah and adopted by the Senate. 81 Cong. Rec. 7947. A similar proposal was introduced in the House. 82 Cong. Rec. 1776. These provisions were omitted from the Act as adopted.

considered employees of the cooperative" (R. 220).¹⁸ But the fact that this precise question was not presented to the Court does not detract from the force of the legal principle for which *Farmers' Irrigation* stands—that an incorporated cooperative is an entity separate from its individual members.

Even if the corporate form of doing business had not been adopted, the Cooperative would still be "an independent entity within the meaning of the Act," as the dissenting opinion points out, for it is plainly an "'organized group of persons'" (R. 223). As such, it is "an entity separate and distinct from the individual members thereof" (*National Labor Relations Board v. Milk Producers Assn.*, *supra*) with "a being of its own which transcends mere 'agency' for the individual [members]." See *United-States v. Kintner*, 216 F. 2d 418, 424, n. 1 (C.A. 9), citing *Maryland & Virginia Milk Producers Ass'n v. District of Columbia*, 119 F. 2d 787, 791-792 (C.A.D.C.), and *American Medical Assn. v. United States*, 317 U.S.

¹⁸ The legislative history (*supra*, fn. 17), was dismissed on the same ground. It is, however, enlightening even though the references do not, in context, specifically deal with working members of a cooperative. These references show that Congress was not only aware of the existence of cooperatives, but also that it knew that the general statutory language would apply to such organizations unless specific exemptions were framed to exclude them and, knowing this, rejected every proposal to exempt cooperatives. There is thus special reason for application of the principle precluding "enlargement by implication" of the specific and detailed exemptions provided in the Fair Labor Standards Act. *Addison v. Holly Hill Co.*, 322 U.S. 607, 617; *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517.

519; 528. Clearly, the meager rights and interests of the homeworkers as members of the Cooperative are in no way inconsistent with their employment status—as is demonstrated by the rhetorical questions in the dissenting opinion below (R. 224): “If a union were given a voice in management, would its members cease to be employees? If an employee acquires stock in his company, does he cease to be an employee?” There is nothing unusual in recognizing the simultaneous coexistence of proprietary and employment relationships—this has been done where the proprietary interests have been much clearer and more valuable than any such interests of the homeworkers here—particularly where the application of remedial legislation is involved. See, e.g., *Hoy v. Progress Pattern Co.*, 217 F. 2d 701, 704 (C.A. 6) (stockholder-officer-director held not precluded from “also being an employee covered by the [Fair Labor Standards] Act”).¹⁹

The admitted facts in this record show that these homeworkers are not truly independent manufacturers or contractors, and that their interests as members of the Cooperative are fully consistent with their status as employees under the Act. Before becoming members, all of the homeworkers, except the

¹⁹ See also, *Deeey Products Co. v. Welch*, 124 F. 2d 592 (C.A. 1) (a social security case involving an attorney, director and stockholder); *Houghton v. Texas State Life Ins. Co.*, 166 F. 2d 848 (C.A. 5), certiorari denied, 335 U.S. 822 (president, director, and stockholder of corporation); *Van Doren v. Van Doren Laundry Service*, 162 F. 2d 1097 (C.A. 3) (office manager, director, and owner of 20 percent of the voting stock); *Parker v. Maynard Boyce, Inc.*, 74 F. Supp. 581 (S.D. Cal.).

few original incorporators,²⁰ must prove their qualification as knitters by purchasing a sample of work from the Cooperative, copying it, and submitting the copy for approval by the Cooperative's Board of Directors or authorized representative, in addition to purchasing a membership interest at a cost of \$3.00, and agreeing to abide by the Cooperative's by-laws, and all rules and regulations made by the Board in connection with their general authority "to manage the affairs of the Cooperative." The by-laws, which were prepared in advance by respondent Bird (respondent Whitaker's attorney) and approved by the few original incorporators, provide that members may not withdraw from membership for at least a year, and may not make or sell to any other business products similar to those produced by the Cooperative;²¹ they may be "expelled" for failure to observe the by-laws or any rules and regulations. The Cooperative's Board or managing officials have the authority to pass upon membership applications and to "expel" members for substandard work and for failure to observe the by-laws, rules and regulations, *i.e.*, to hire and fire the homeworkers. In addition, the Board or the managers fix the "prices" or piece rates which are paid to the "member-producers," and instruct them as to the designs and colors to be used in the work.

²⁰ At the time of the trial of this case, there were some 200 homeworke-members (R. 17-23); only 26 were original incorporators (R. 201).

²¹ The homeworkers here thus have even less independence than they had under the *Wagner* arrangements (*supra*, p. 5), which left them free to offer their goods to others, and as pointed out by District Judge Kennedy, "some * * * sold their goods elsewhere" (89 F. Supp. 304, 305).

See the Statement, *supra*, pp. 10-11. Moreover, as pointed out in the dissenting opinion below (R. 222-223), it is clear that the Cooperative is controlled, at most, by "only some" of the members, and that most of the homeworkers "do not exercise, and * * * are unable to exercise, any control, effective or otherwise," so that at least "all inactive members differ in no respect from employees of any homework employer."

Finally, it is plain that the Cooperative is the real principal with respect to transactions with third parties—in selling the wares, collecting payment for them, making good on warranties, etc. The Cooperative is not merely the agent of the members, but is itself the principal. Those dealing with it would look to it, not to the individual members, if any dispute arose as to the sale or purchase of the commodities marketed by the Cooperative.

C. The decision below is contrary to the prior decisions which have sustained the Act's coverage of homeworkers; including this class of homeworkers.

Prior to the decision in the instant case, every court of appeals which had occasion to rule on the application of the Act to homeworkers held them to be employees subject to the Act, regardless of the legal arrangement designed to avoid coverage (see *supra*, p. 29, fn. 16). The facts of those cases are closely analogous to the present one, and the arrangements are indistinguishable in any respect relevant to coverage. See, in particular, the First Circuit's own earlier decision in *Fleming v. Palmer*, 123 F. 2d 749,

certiorari denied *sub nom.*, *Caribbean Embroidery Co-operative, Inc. v. Fleming*, 316 U.S. 662, the Sixth Circuit's decisions in *Harwood v. Tobin*, 194 F. 2d 538, and *Walling v. American Needlecrafts, Inc.*, 139 F. 2d 60, and the Second Circuit's decisions in *Mitchell v. Edward S. Wagner Co.*, 217 F. 2d 303, affirming 115 F. Supp. 118 (E.D.N.Y.), certiorari denied, 348 U.S. 964, and *Walling v. Twyeffort, Inc.*, 158 F. 2d 944, certiorari denied, 331 U.S. 851. As noted *supra*, p. 24, the *American Needlecrafts* and *Twyeffort* decisions were cited with approval by this Court in its *Rutherford* opinion.

The *Wagner* and *Harwood* decisions concerned some of the very homeworkers in the instant case who are now making the same kind of knitted and crocheted articles for respondents under virtually the same conditions, despite formal differences in the efforts to cloak reality in new conceptual guise. In *Wagner*, which involved New England homeworkers, the device was a "purchase and sale" arrangement, and in *Harwood*, involving Tennessee homeworkers, it was a "*del credere* agency" arrangement.²²

²² *Harwood* and *Wagner* were the decisions which motivated unsuccessful legislative proposals discussed *infra*, pp. 41-43.

The majority below ignored these decisions apparently because they did not involve the cooperative form, but relied instead on the district court's decision in *Walling v. Plymouth Mfg. Corp.*, 46 F. Supp. 433 (N.D. Ind.), affirmed on other grounds, 139 F. 2d 178 (C.A. 7), certiorari denied, 322 U.S. 741. Apart from the fact that *Plymouth* did not involve either homeworkers or the incorporated cooperative device, the case was decided before this Court's *Hearst*, *Silk*, and *Rutherford* decisions, and its holding is out of line with the great body of law interpreting social legislation. It is also to be noted that, while the court permitted the officials in control of the

The decision below should also be compared with the Fourth Circuit's decision in *McComb v. Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; and with the First Circuit's own earlier decision in *Fleming v. Palmer*, *supra*, discussed more fully *infra*, pp. 46 ff. These cases, as the court below apparently recognized, involved cooperative organizations paralleling the legal form of the Whitaker House Cooperative. The court's distinction of the instant case on the ground of the "district court's finding of a *bona fide* cooperative with control by the member-producers" (R. 218) is not borne out by the *Homeworkers' Handicraft* decision. The Fourth Circuit there reversed the district court, despite the finding that the homeworkers were "independent contractors functioning through the cooperative" (176 F. 2d at 635), stating (through Chief Judge Parker) that the homeworkers' status as employees "has not been affected by the organization of the cooperative, whatever view be taken as to who exercises the real control over it" (*ibid.*) and approving as "manifestly sound" the view "that the 'law of independent contractors,' so far as the Fair Labor Standards Act is concerned, cannot nullify the will of Congress, and take away the benefits of the

business (the "senior partners"), to escape responsibility as the "employer," it expressly declined to decide whether the enterprise was operated by "a partnership composed of all the parties who signed the so-called partnership agreement" or whether, assuming the existence of "such larger partnership * * * the workers [the so-called junior partners]" were employees and the partnership was employer within the meaning of the Fair Labor Standards Act" (139 F. 2d at 182).

statute from pieceworkers in the needlework trades, even in the absence of a showing of domination and control." Referring to "the carefully considered decision of *Walling v. American Needlecrafts*," 139 F. 2d 60 (C.A. 6), *supra*, p. 36, Judge Parker said it was "on 'all fours' with the case here, except as to the effect of the intervention of the cooperative," 176 F. 2d at 637." In *American Needlecrafts*, there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fide entered into" (46 F. Supp. 16, 23 (W.D. Ky.)), and the opinion of the court of appeals was not predicated upon any different assumption. Nor was there any suggestion in the *Harwood* and *Twyeffort* decisions, *supra*; that the contracts were not equally "bona fide."

These decisions, like numerous rulings on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory * * * regardless of the good faith of the employer." *Rigopoulos v. Kervan*, 140 F. 2d 506, 507 (C.A. 2). As this Court has stated, "The statute was a recognition of the fact that * * * certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank v.*

²² Also, contrary to the apparent assumption by the court below, the Fourth Circuit directed that the decree enjoin the cooperative as well as the bag companies, thus indicating its view that the cooperative was also the employer of the homeworkers.

O'Neil, 324 U.S. 697, 706-707; see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, and cases cited at pages 392-393.

Thus, even if it be assumed that there was absolute good faith in organizing and executing a member-controlled cooperative, this would not suffice to alter the homeworkers' well-settled status as employees under the Act. Under the governing criteria, the "more relevant economic and statutory considerations" (see *supra*, pp. 23-24) are whether such a "bona fide" arrangement has, in fact and in economic reality, so changed the status of the homeworkers as to make them, by standards of "normal business relationships," truly independent self-employed producers or entrepreneurs (cf. *Silk*, 331 U.S. at 714), or whether their interests and obligations under the cooperative arrangement are not "entirely consistent with" and "of a type that did not alter their status as employees under the Act" (cf. *Labor Board v. Atkins*, *supra*, 331 U.S. at 405-406).

As we have shown, *supra*, pp. 2-13, 33-35, the actual relationships between the homeworkers, on the one hand, and the Cooperative and its managers, on the other, accord with the normal relationships between an employer and his employees. The members are not, in reality, independent or self-employed. The situation is not one of the established "normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution" (cf. *Silk*, 331 U.S. at 714). On the contrary, this cooperative arrangement, like others which the courts have uni-

formly rejected over the years, is a formal and verbal device for avoiding regulation of a relationship which the Act was intended to cover, without changing the normal business relationships in any substantial respect.

D. Coverage of these homeworkers is confirmed by the legislative ratification of the administrative restrictions upon homework and by the repeated legislative rejection of proposed amendments to exempt this class of rural homeworkers

In 1939, before the Act was a year old, several bills were introduced in the House of Representatives for the purpose of amending Section 14 so as to authorize the Administrator specifically to permit the employment of rural homeworkers at wage rates lower than the statutory minimum.²¹ In its report accompany-

²¹ H.R. 5435, the first Norton bill, amended by the House Committee on Labor; H.R. 6406, the second Norton bill; H.R. 7123, the Barden bill; H.R. 7349, the Ramspeck bill. The bills were virtually identical in their proposal for the amendment of Section 14, as follows: "The Administrator shall promulgate regulations permitting the employment, in rural areas, of employees in the home at such wages lower than the minimum wage applicable under Section 6, and containing such provisions governing the piece rate to be paid, the time of day during which such work shall be performed, and such other provisions, as the Administrator may prescribe. No such regulation shall be promulgated with respect to any employees (1) if in the opinion of the Administrator the application of section 6 to such employees does not have the effect of curtailing the opportunities of such employees for employment; (2) if the promulgation of such regulation would in the opinion of the Administrator have the effect of curtailing employment in the factories or industrial establishments, if any, in which similar work is performed; or (3) if the promulgation of such regulation would in the opinion of the Administrator give the em-

ing the proposed amendment for homeworkers, the House Committee on Labor stated: "The act at the present time treats homeworkers just as any other type of employee" (H. Rept. 522, 76th Cong., 1st Sess., p. 10). It was argued that the proposed amendments would restore to rural people additional income which they could earn from industrial homework if the wage and hour requirements were lifted. (86 Cong. Rec. 4924, 5122). But the amendments were finally rejected because of the conviction that the economic evils which the Act prohibited should not be restored and that the original legislative aim to include industrial homeworkers within the full scope of the Act was in every respect sound. See, *e.g.*, 86 Cong. Rec. 5225, 5136.

Following this compelling evidence of the original and continuing Congressional intent to include homeworkers within the scope of the Act, the Administrator issued regulations restricting the employment of homeworkers in the several industries in which homework was found to be most prevalent. Although Congress was repeatedly advised of the issuance of these regulations in the Administrator's annual reports,²⁵ no further attempt to exempt rural homeworkers was made until the 1949 Amendments were under consideration. At that time, Congressman Cooper of Tennessee proposed, and the House adopted (95 Cong. Rec. 11209-11210), an amendment which would have

ployer or employers of such employees a substantial competitive advantage."

²⁵ Annual Reports of the Administrator to Congress 1943, pp. 19-20; 1944, p. 17; 1946, p. 5; 1947, pp. 32-33; 1948, pp. 15-17; 1949, p. 29.

exempted from the Act "any homemaker in a rural area who is not subject to any supervision or control by any person whomsoever, and who buys raw material and makes and completes any article and sells the same to any person, even though it is made according to specifications and the requirements of some single purchaser" (Section 13(a)(17) of H.R. 5856). In explaining "the situation sought to be taken care of by this amendment," Congressman Cooper said (95 Cong. Rec. 11209):

There are several hundred women throughout Tennessee, mostly around Gibson County * * * who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anyone who might want to purchase them. In recent years Mrs. Doris Harwood, of R.F.D., Trenton, Tenn., has been operating a small business from her home, about 4 miles from Trenton. She buys these articles from the women of that section, who are largely farmers' wives. * * *

* * * *

It is my understanding that the Wage and Hour Division * * * has notified Mrs. Harwood that she could not buy any of this crocheted wearing apparel from any of these women unless they were physically handicapped and that they were required to have a medical certificate to this effect before they could make these articles and sell them to her.²⁶

²⁶ This is the same Mrs. Harwood who was enjoined from employing and underpaying non-certificated homeworkers in *Harwood v. Tobin*, 194 F. 2d 538 (C.A. 6), affirming *per*

The Senate bill contained no such exemption. The conference agreement followed the Senate. The Conference Report makes it clear that the omission was not unintentional. H. Rept. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14933. On the contrary, subsection 11(d) (*supra*, p. 3) was added, continuing in full force and effect the administrative regulations and authorizing the Administrator to restrict or prohibit homework. 95 Cong. Rec. 14927. In every Congress since 1949, bills identical to Congressman Cooper's proposal have been offered. None gained approval.²⁷ This informed Congressional acquiescence in the broad application of the Act to homeworkers should be given special weight.²⁸

E. Respondent cooperative, under its charter and the decision below, can be readily expanded so as to cause general widespread revival of the homeworker problem

The court below, absorbed as it was in the "predicament" of the particular homeworker ladies immediately the decision of the district court (not officially reported), 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.). See *supra*, pp. 36-37.

²⁷H.R. 4661, 82d Cong., 1st Sess., Congressman Cooper; H.R. 237, 83d Cong., 1st Sess., Congressman Cooper; S. 1950, 83d Cong., 1st Sess., Senator Kefauver; H.R. 84, 84th Cong., 1st Sess., Congressman Cooper; S. 2963, 84th Cong., 2d Sess., Senator Payne; H.R. 8809, 84th Cong., 2d Sess., Congressman McIntire of Maine; H.R. 2618, 85th Cong., 1st Sess., Congressman McIntire; S. 1160, 85th Cong., 1st Sess., Senator Smith of Maine; S. 25, 86th Cong., 1st Sess., Senator Smith; H.R. 5713, 86th Cong., 1st Sess., Congressman McIntire.

²⁸*United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543; *Alstate Construction Company v. Durkin*, 345 U.S. 13, 17; *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner v. Mitchell*, 350 U.S. 247, 255.

afely concerned (see Judge Aldrich, R. 224), appears to have paid no heed to the far-reaching impact of this Cooperative on the homemaker problem generally, in other industries as well as in the knitted infants' wear industry.

While the Cooperative had acquired, at the time of trial, only 200 homework members located primarily in rural areas of Maine and Tennessee (but also a few scattered members in nine other states, R. 17-23), its charter is not limited to any particular regions nor to knitted infants' wear, but includes in its purposes "[t]o manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in *general to carry on a knitted wear business*" (R. 163; emphasis added), and its by-laws provide for unlimited expansion by making "[a]ll persons, including married women *and minors*, firms and corporations * * * eligible for membership" (R. 153, By-laws, Art. 6, Sec. 1; emphasis added). That such expansion is not a mere possible contingency, but a very probable prospect, is evident from the expansion already made (to include toys and women's capes and stoles) and from the groundwork laid by extension of membership to homeworkers scattered in eleven different states; that had already occurred at the time of trial (see the Statement, *supra*, pp. 11-12). As testified by the Cooperative's accountant, "[m]any people, there is no question, are waiting to see how this [case] comes out" before they "send anything into the Cooperative," and it is expected that the Cooperative

"will be swamped with business" if "the Cooperative and its officers should prevail in this action" (R. 151).

Thus, under the ruling below, the homemaker problem in the embroidery industry, which has been regarded as settled by this Court's decision in *Gemsco, Inc. v. Walling*, 324 U.S. 244 (upholding the validity of the regulations prohibiting homework in this industry); could be revived simply through expansion of the membership and business of the respondent Cooperative. An aggravated aspect of this threatened revival is its child labor implications. As pointed out in *Gemsco*, it was undisputed that in the embroidery industry, in addition to the prevalence of substandard piece rates, "hidden child labor [was] a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves" (324 U.S. at 253, n. 17). As this Court has noted, the employment definitions of the Act apply to its child labor restrictions as well as to the wage and hour standards (see *Rutherford, supra*, 331 U.S. at 728). Even if there were reason to believe that this particular Cooperative would not expand its operations into other industries, the effect of the decision below on other industries would nonetheless be substantial, since the same disposition to avoid the Act's application to homeworkers has been evidenced in other industries to which the cooperative form of organization here involved is readily adaptable.

II

THE RULING BELOW THAT WHITAKER HOUSE COOPERATIVE IS A BONA FIDE MEMBER-CONTROLLED ORGANIZATION IS CLEARLY ERRONEOUS

We recognize that ordinarily this Court will not review concurrent factual findings by two courts below, but we suggest that, with respect to the finding that the respondent Cooperative was a bona fide member-controlled organization, review is warranted because the First Circuit's affirmance of the district court's conclusion in this case is very difficult to reconcile with its earlier action in the entirely comparable case of *Fleming v. Palmer*, 123 F. 2d 749, *supra*, pp. 35-36, and also because the "finding" was, in effect, a determination of the ultimate legal issue—whether the homeworkers are independent and self-employed—based upon "inferences * * * drawn by the courts from facts concerning which there is no real dispute" (cf. *Silk, supra*, 331 U.S. at 716-717).

Not only do the admitted facts in this record establish that most of the homeworke~~r~~-members had nothing to do with the original organization of this Cooperative and exercise no control over its operations (*supra*, pp. 2-13, 33-35), but the evidence "considered as a whole * * * compels a finding that [the individual respondents] controlled this cooperative", no less than Palmer controlled his cooperative (*Palmer, supra*, at 759). Accordingly, Mrs. Whitaker remained the employer of the homeworkers as she had been before—or, if the Court should view the Cooperative as not entirely a sham organization, but still not bona fide

member-controlled, the Cooperative itself could be considered the employer.

Whether or not respondents here may have had some genuine intent to assist the homeworkers in utilizing their time and skills to their best financial advantage, the finding below that the Cooperative is a "bona fide * * * member-controlled cooperative," for the purposes of this Act, is plainly contradicted by the evidence. While respondents, educated by the *Palmer* decision, avoided some of the most blatant "mistakes" made by Palmer, the organization and operation of the Whitaker Cooperative have paralleled the Palmer Cooperative²⁹ in all respects material to true membership control. Indeed, the First Circuit's reversal of the district court's comparable finding of a member-controlled cooperative in *Palmer* was predicated on essentially the same kind of evidence contained in this record—the Cooperative's by-laws, minutes and other documentary evidence, as well as the testimony of respondent Whitaker and of the Cooperative's other officers, concerning which there is no conflict (cf. 123 F. 2d at 751).

The first factor which the Court of Appeals considered significant in *Palmer* was the fact that Palmer "actively participated in the organization of the cooperative for the express purpose of avoiding the Fair Labor Standards Act" (123 F. 2d at 759). "This fact," said the court, "is not an element bringing him

²⁹ Respondent Bird stated to the court below that he conceived the idea of a cooperative from reading that court's *Palmer* decision. This case had been cited to him by the Labor Department's regional attorney in a letter dated January 2, 1957 (Petitioner's Exhibit No. 1).

within the scope of the Act, but his motive does have some probative value on the issue of control for it shows that he was actuated not so much by a desire to benefit his workers as by fear of loss to himself" (*ibid.*). This is no less true in the instant case. Although Mrs. Whitaker never admitted her part in the organization of the cooperative,³⁰ the trial court was impelled to find—and its finding has not been challenged—that she and her attorney, respondent Bird, "actively participated in the organization of the

³⁰ Thus, when asked who it was that had suggested the organizational meeting, she replied "I don't think I could answer that" (R. 42). She also stated that she could not say "who made the arrangements and notified the people to be present" (*ibid.*). Nor could she remember who had sent the notices out to the homeworkers (R. 44), although it was her own attorney (R. 190). Her memory was equally bad when she was asked whether she knew who had furnished the list of persons to whom notices should be sent (R. 44). Although Mrs. Whitaker's poor memory did not deter her from being positive that one of the Wage and Hour Division's investigators first suggested that she change her business over to a cooperative (R. 41), it was later stipulated by the parties "that the idea of a cooperative did not originate with the Wage and Hour Division; and that 'the idea of organizing a cooperative arose spontaneously as a result of * * * joint discussions, no one participant in the discussions being solely responsible'" (R. 200). Cf. attorney Bird's admission (fn. 29, *supra*, p. 47).

Equally contradictory was Mrs. Whitaker's testimony concerning conferences with her attorney, respondent Bird. At one point she claimed that Mr. Bird has represented her "[j]ust since June" of 1957 (R. 119) when the cooperative was organized. At another point, however, she admitted that she had conferred with him "[e]arly in '57" (R. 40). And when asked how many times she had talked with Mr. Bird prior to the organizational meeting, she replied: "I couldn't tell you" (R. 44); she could not even give a rough "idea" (*ibid.*).

Cooperative for the express purpose of attempting to avoid application of the Fair Labor Standards Act to the homeworkers here involved" (R. 209). Like Palmer's attorney, Mrs. Whitaker's attorney advised "as to the details of organizing the cooperative" (R. 44), "suggested each step of the way as the workers knew nothing about a cooperative" (123 F. 2d at 753), and prepared the articles of association, the by-laws and other formal papers in advance of the meeting, which was ostensibly called to consider whether a cooperative should be formed at all. Within a few hours, the articles of association were signed by the incorporators, the by-laws were adopted, and directors elected (R. 201-203).

The next factor considered indicative of the homeworkers' "state of economic subservience" to Palmer was that they had been "told that their livelihood is dependent on the continued existence of the cooperative, and they know that he can deal it the death blow at any time by rescinding the contracts and proceeding to the liquidation of the large debt owing him" (123 F. 2d at 759). While Mrs. Whitaker did not flatly tell the homeworkers that they would be without work if they did not form a cooperative, the organizational letter, albeit more artfully phrased, made it clear enough that if the homeworkers "want to continue to make products in your home" and "have a ready market for the products" (R. 190), formation of a cooperative was the "only way" (R. 192), since it "would enable them to comply with [*i.e.*, avoid] the Federal Laws concerning wage and hour regulation" (R. 191). This not-too-subtle hint that the home-

workers' previous earnings would be discontinued unless they cooperated with Mrs. Whitaker in changing over to the cooperative form was unquestionably the compelling reason for their participation. That their interest did not go beyond mere continuance of their homework as before was made clear by the testimony of Mrs. Leavitt, who had worked for Mrs. Whitaker as a trimmer and also as a homemaker, and who is now a member of the Cooperative's Board of Directors (R. 202). When asked what the cooperative had done for its members, she said: "It is or has enabled them to keep on working in their homes. I think that is the main thing it's done for them" (R. 127).

Like Palmer, Mrs. Whitaker, also, is in a position to deal the "death blow" to the cooperative at any time. She is its largest creditor, being due \$7,908 for unpaid "salary" and the balance still due on the inventory which she "sold" to the Cooperative (R. 193). In addition, she owns the premises (her home) in which the Cooperative has its principal and only place of business.

Also indicative of the absence of intent to give the homemaker-members any real control over the cooperative is the fact that not one of the 40 homeworkers who attended the organization meeting became an officer. Respondent Bird, Mrs. Whitaker's attorney, was elected president, and his father, Stanley Bird, became clerk. Mrs. Whitaker was made Secretary-Treasurer, and a retired electrician (Jack Kennedy), who is a cousin of Mrs. Whitaker's husband (R. 85, 202), was elected Vice-President. Kennedy's election to office was patently in violation of the by-laws which

make membership in the cooperative a requisite for holding office, and limits membership in the cooperative to the original incorporators and qualified crocheters and knitters. Not only was Kennedy not one of the original incorporators (R. 164), but his talents as a crocheter or knitter nowhere appear in the record. The inference is plain that he was simply Mrs. Whitaker's nominee.³¹

Supervision of the Cooperative is nominally in its Board of Directors, but their supervision is obviously "in fact only perfunctory", cf. *Bowles v. Villari*, 61 F. Supp. 784, 787 (E.D. Pa.), affirmed *sub nom. Porter v. Villari*, 156 F. 2d 690, 691 (C.A. 3). While it would appear from the minutes of the Board meetings that the matters discussed and acted upon were brought up by the members themselves, attorney Bird himself disclosed the true meaning of this when he asked a director-witness to state what he (Bird), as president, did at the monthly meetings. In Bird's own words, he presented the "problems that it was necessary for the Board of Directors to decide" (R. 115). Admittedly, Bird has attended all Board and membership meetings except one, the annual membership meeting held in June 1958 (R. 206), and present in his place at that meeting was Burton G. Shiro, also an attorney from Waterville, Maine, who served as "parliamentary counsel," in which capacity he "discussed the Government action against the Coopera-

³¹ No other reasonable explanation can be found in the record for Kennedy's association with the cooperative (from which he receives no salary) and his willingness to endorse personally its note for \$5,000 given to secure a bank loan made by the cooperative (R. 82-83).

tive" and "expressed the opinion that * * * the members are independent contractors and not employees" (R. 181).

Thus, it is not remarkable that the Board—theoretically described as a limitation on the individual respondents' control—was actually subservient. In over a year of operation, the members of the Board did not once disagree on a single action; all motions or resolutions passed, according to the minutes, by unanimous vote. The absence of any real supervision of operations by the Board also plainly appears from Mrs. Whitaker's testimony that she often left Board meetings after giving her report, and never bothered to read the minutes (R. 103), although they purportedly contained the instructions of the Board which she was to follow in carrying out her functions as general manager.

As in *Palmer*, the organizational set-up here was plainly "calculated to leave control in a very small group which was most naturally inclined to be friendly to [respondents Whittaker and Bird]" (123 F. 2d at 760). As we have pointed out, the officers elected at the first Board meeting were Mrs. Whitaker, her attorney, her attorney's father, and her husband's cousin. Although one homeworker-member is now serving as treasurer, having been "appointed" to the office by the Board (despite the requirement of the by-laws for election of officers by the members, see *supra*, p. 10, fn. 6) when Mrs. Whitaker resigned from it (R. 172), we think it may be safely assumed that she is friendly to Mrs. Whitaker.³ At any rate, the fact that the office of Secretary-Treasurer has been

split does not mean that the group in control is now any larger. For the new treasurer is not only one of the members of the Board, but is Chairman of the Board and one of its most faithful members, never having missed a meeting (R. 136). Of the five present directors, (including the one who also serves as treasurer) each had been one of Mrs. Whitaker's homeworkers and two had also worked for her as trimmers (R. 202).

The instant case parallels *Palmer* in still another important respect. There, as the First Circuit noted, Palmer admitted that the business "is continued and still continues almost the same as before the cooperative was established" (123 F. 2d 759). Here, too, the business has been continued and operates essentially the same as before the cooperative was formed. Despite Mrs. Whitaker's understandable reluctance to admit this on the stand, the only changes she could point to, apart from the formalities necessarily attending the corporate form of operation (see, e.g., R. 95, 97), were changes attributable to growth and expansion, such as new accounts and different customers (R. 47), increased sales (R. 106), and the addition of a new line of knitwear or knit goods consisting of women's stoles (*ibid.*) and woolen toys (R. 107). Mrs. Whitaker had to admit that her own work after the formation of the cooperative "was substantially the same" except that she no longer does any selling (R. 49). As pointed out in the Statement, *supra*, pp. 5, 11, the selling was transferred to Mrs. Doris Law under an "exclusive sales" agreement (R. 206), almost from the beginning. This, in itself, is

good reason for questioning the bona fides of the cooperative. Since Mrs. Law has been enjoined from employing homeworkers in the infants' knitwear industry in violation of the Act, it would appear that what has actually happened here is that she and Mrs. Whitaker have joined forces. This obviously accounts for the fact that the Cooperative has such a large number of members in Tennessee where Mrs. Law previously conducted her business. It also explains why the Cooperative has new accounts and many more customers than did Mrs. Whitaker in her previous operation.

While Mrs. Whitaker tried to convey the impression that the homeworkers, not she, were instrumental in forming the Cooperative, and that the part which she would have in the Cooperative was not determined beforehand, her claim is plainly invalid. Although certain that she became the Cooperative's general manager from the start, she could not remember how it happened (R. 45-46). And while asserting that her arrangements with the Cooperative were worked out at arms' length, it appears that "nothing was ever reduced to writing between the parties" (R. 67),³² and that Mrs. Whitaker never delivered or even executed a bill of sale to the Cooperative when, as she testified, she turned her business over to it "[l]ock, stock and barrel" (R. 45, 66). Only Mrs. Whitaker's identity with and assured control over the Cooperative

³² In the *Villari* case, *supra*, the trial court expressly noted that the lease agreements and employment contract between Villari and his sham cooperative, though reduced to writing, "were never signed by Villari nor did the Board of Directors ever insist upon execution" (61 F. Supp. at 787).

can explain why the Cooperative did not insist upon a bill of sale and why Mrs. Whitaker did not insist upon written evidence of the Cooperative's obligation to pay her for her business, if she was really parting with it.

Equally inexplicable, except on the basis that the Cooperative is nothing more than a cloak for Mrs. Whitaker, are the loose and informal arrangements by which she became general manager. Although uncertain as to how she became general manager (R. 45-46), Mrs. Whitaker was certain that she was to receive a weekly salary of \$55 (R. 49). While salary at that rate has been accruing for her from the date the Cooperative started operations on July 18, 1957, no written agreement was ever prepared and no notation of the arrangement appears in the Cooperative's minutes until the twelfth meeting of the Board of Directors, held over a year later on the eve of the trial of this case, September 11, 1958 (R. 187-188).

Further evidence that the change to the cooperative form was not one of substance is the fact that Mrs. Whitaker has not drawn her salary, while members have been paid almost currently for their work. Since the by-laws require that wages and salaries be paid first (Art. 11, Sec. 1; R. 160), the inference is that the amount fixed as Mrs. Whitaker's "salary" was not intended as the measure of her compensation. Rather, it appears to be merely a device to limit the homeworkers' rewards to the fixed prices initially advanced to them. And beyond serving that purpose, the unpaid portion of Mrs. Whitaker's "salary," like the unpaid portion of the inventory "price," gives

Mrs. Whitaker effective control over the Cooperative by making her its largest creditor.

The by-laws, like the "salary" and "sale" arrangements, also appear to be largely window dressing, more honored in the breach than in the observance. Thus, no quorum ~~was~~ present at either of the two membership meetings (R. 122-123, 69, 73-74; Minutes of Meetings of October 26, 1957, and of June 26, 1958). Not only were those present unconcerned about the lack of a quorum, but they attempted to lift themselves by their bootstraps. At the June 26, 1958, meeting, they purported to amend the by-laws so as to reduce the number required for a quorum.³³ At the earlier meeting in October, Ella Banton was "confirmed" as treasurer (R. 173), to which office she had been appointed by the Board of Directors despite the by-laws' requirement that officers be elected by the members (R. 158).

The sparse attendance at the infrequent membership meetings corroborates the homeworkers' lack of control over the Cooperative. Forty-one out of 172 members attended the special meeting of October 26, 1957 (R. 123, 172). Only 37 out of the 195 members attended the other membership meeting on June 26, 1958, at which officers and directors were elected and

³³ The purported action seems to have been irregular on another score. While the by-laws provide that they may be amended by the vote of a majority of the members present at a special meeting called for such purpose or at a regular meeting, the notice of the special or regular meeting must set forth fully and clearly the proposed amendment (R. 74; 161). The minutes do not reflect that the notice of the June 1958 meeting did this.

other vital business was on the agenda (R. 74, 181-183). True, the many members who live in Tennessee and other distant states could hardly be expected to attend meetings. By the same token, however, the fact that so many nonresidents of Troy, Maine, and its environs have been admitted to membership confirms the conclusion that it was never intended that the body of homeworker-members would control the Cooperative. Obviously, "[s]uch 'members' cannot be said to exercise entrepreneurial skill, and they do not exercise, and * * * are unable to exercise, any control, effective or otherwise. To them Cooperative simply furnishes an opportunity to do homework, and to dispose of it, that is to say, get paid for it * * * differ[ing] in no respect from employees of any homework employer" (see the dissent below, R. 222-223).

In sum, here, as in *Palmer*, the evidence, considered as a whole, compels a finding that this Cooperative is not a bona-fide member-controlled organization—certainly not in any sense relevant to the coverage of this Act.

CONCLUSION

The decision and judgment below should be reversed with direction to enter the injunction prayed for in the complaint.

Respectfully submitted.

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FEBRUARY 1961.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) are as follows:

SEC. 3. [52 Stat. 1061] As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *

"(e) "Employee" includes any individual employed by an employer.

* * * *

(g) "Employ" includes to suffer or permit to work.

* * * *

SEC. 6. [52 Stat. 1062; 63 Stat. 912; 69 Stat. 711] (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than \$1 an hour;

* * * *

SEC. 11. [52 Stat. 1066] * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages,

hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) [63 Stat. 916-917] The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

* * * * *

SEC. 15 [52 Stat. 1068] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(5) [63 Stat. 919] to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

2. As currently codified, the pertinent parts of the Regulations adopted pursuant to the Fair Labor Standards Act of 1938 reads as follows (29 C.F.R. Part 530):

§ 503.1 Definitions.

(a) The meaning of the terms "person", "employ", "employer", "employee", "goods",

and "production", as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homemaker" and "homemaker", as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework", as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homemaker in such production.

* * * * *

(f) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided*, That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulle suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

* * * * *

§ 530.2 Restriction of homework.

No work in the industries defined in § 530.1 (d) through (j) shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.1 of this chapter.

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefor on forms provided by the Wage and Hour and Public Contracts Divisions. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour and Public Contracts Divisions, certificates may be issued to the applicant employer authorizing him to employ a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1)(i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (a) April 4, 1942, in the button and buckle manufacturing in...

dustry; (b) November 2, 1942, in the embroideries industry; (c) April 1, 1941, in the gloves and mittens industry; (d) October 7, 1942, in the handkerchief manufacturing industry; (e) July 1, 1941, in the jewelry manufacturing industry; (f) August 20, 1941, in the knitted outerwear industry; or (g) March 5, 1942, in the women's apparel industry (except that if this requirement shall result in unusual hardship to the individual homemaker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homemaker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

* * * * *

§ 530.9. Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

3. When originally issued on March 30, 1942 [7 F.R. 2592], the Regulations restricting the employment of homeworkers in the Knitted Outerwear Industry were codified as 29 C.F.R. 617, and read, in pertinent part, as follows:

PART 617—MINIMUM WAGE RATE AND REGULATIONS APPLICABLE TO HOME WORKERS IN THE KNITTED OUTERWEAR INDUSTRY

* * * * *

§ 617.3 *Restriction of home work.* No work in the Knitted Outerwear Industry, as defined herein, shall be done in or about a home,

apartment, tenement, or room in a residential establishment after November 30, 1942, except by such persons as have obtained special home-work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by any worker who was engaged in industrial home work in the Knitted Outerwear Industry prior to August 20, 1941, or is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or a Sheltered Workshop as defined in § 525.1 of this title, and who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home.

* * * * *

§ 617.101 • *Definitions.* As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

The term "knitted outerwear industry" as used herein means: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric * * *

* * * * *

4. The original Regulations, Part 617, were clarified on April 20, 1951, as follows [16 F.R. 3435]:

**PART 617—KNITTED OUTERWEAR INDUSTRY,
MINIMUM WAGE ORDER, HOME WORKERS**

DEFINITION OF CERTAIN TERMS

The Administrator of the Wage and Hour and Public Contracts Divisions, pursuant to section 8 of the Fair Labor Standards Act of 1938, as amended, issued a minimum wage order for the Knitted Outerwear Industry, effective April 20, 1942. In conjunction with the issuance of this wage order the Administrator found that in order to carry out the purpose of the order and to prevent the circumvention or evasion thereof it was necessary to include in the order a provision restricting home work in the industry. To accomplish this restriction the Administrator issued regulations which provided that "no work" in the industry "shall be done in or about a home, apartment, tenement, or room in a residential establishment," except under special certificates to be issued only under specified conditions, and which, among other things, defined the term "industrial home work" as the "production by any person in or about a home, apartment, tenement, or room in a residential establishment for an employer of goods from materials furnished directly by or indirectly for such employer."

The Administrator is of the opinion that the regulations were intended to apply to all employment in home work whereby goods are produced for or on behalf of members of this industry, regardless of the source of the materials used by the homeworkers, and has been enforcing the regulations on the basis that homeworkers employed in this industry were subject to the act and the regulations whether they produced directly for an employer or distributor, or under a so-called "purchase and sale" or "agency" arrangement or other devices designed to disguise the employment rela-

tion. The fact that the regulations have been so construed and enforced has been well known to the members of the industry through the institution of court proceedings by the Administrator and the Secretary of Labor (*Tobin v. Wagner*, *infra*; *Tobin v. Harwood*, 10 W.H. Cases 73 (W.D. Tenn.); *Tobin v. Van Wagen-Sager, Inc.* (N.D.N.Y. No. 3129)), and through court decisions upholding such construction (*Tobin v. Harwood*, 10 W.H. Cases 73 (W.D. Tenn.); *Cf. Walling v. Wolff*, 63 Fed. Supp. 605 (N.D.N.Y.))

Most of the members of this industry who formerly used or dealt with homeworkers have for years been under court injunction prohibiting the employment of homeworkers except in accordance with the statutory minimum and overtime requirements, and from using any "purchase and sales arrangements with any home workers" to avoid the requirements of the Act or the injunction "whether the materials are furnished by defendants or by others" (*Jacobs v. Hand Knitcraft Institute*, Civil 6-354 (S.D.N.Y.) 2 Wage and Hour Reporter 499, decree entered November 21, 1939).

The administrative authority to regulate or prohibit such home work clearly exists, particularly since the addition of section 11(d) to the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 29 U.S.C. sec. 211(d)). In a recent decision by the United States Court of Appeals for the Second Circuit in the case of *Tobin v. Wagner Company, Inc.*, (March 21, 1951), the Court expressly recognized the administrative authority to regulate such home work, but questioned the intended scope of the present regulations on the ground that the language defining "industrial home work" is not sufficiently clear in the absence of "published rulings" giving notice of the administrative construction of such language as being applicable to situations

where the homeworkers obtain their materials from a source independent of the person for whom the goods are being produced.

* * * * *

Now, therefore, pursuant to authority vested in me by section 11(d) of the Fair Labor Standards Act of 1938, as amended, § 617.101 is amended to read as follows:

§ 617.101 *Definitions.* The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this part is the same as in the Fair Labor Standards Act of 1938, as amended.

"Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

* * * * *

MAR 18 1961

JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor, v
PETITIONER,

WHITAKER HOUSE COOPERATIVE, INC., *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1960

✓

No. 274

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
PETITIONER.

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WHITAKER HOUSE COOPERATIVE, INC., *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

7

BRIEF FOR THE RESPONDENTS

1. Question Presented

Are member-patrons of a true cooperative (i.e. Whitaker House Cooperative, Inc.) employees of themselves under the Fair Labor Standards Act?

2. Statement of the Facts

The opinion of the District Court (Petitioner's Record Appendix 78-79, officially reported at 170 F. Supp. 743) contains a fair statement of the facts. (See pages 198 to 208 of the Petitioner's Transcript of Record.) However, some aspects of the operation of the Cooperative are omitted, therefore, a short statement is included here for the benefit of the Court.

In the spring of 1957 a group of about fifty women from the central portion of Maine between the ages of thirty-five and eighty-five gathered together for the purpose of organizing an association which would enable them to market the products of their hand work. These women, for the most part came from what would certainly be considered rural areas and would be classified as skilled artists in the making of crocheted and knitted outer wear primarily for infants. Many of these women in conjunction with their husbands own their own homes, made these items in their spare time, for the most part, in their own homes with materials such as wool, nylon yarn and knitting needles or crochet hooks supplied by themselves. Most of these women had been making these items for many ~~years~~ in some cases as much as fifty years.

On July 9, 1957 some thirty of them met as a group at the Jefferson Hotel in Waterville, Maine, for the purpose of organizing themselves. At this meeting they decided to organize into an incorporated cooperative which they name Whitaker House Cooperative, Inc. The purposes of the corporation which was to be established by them was

- "1. To manufacture, sell, and deal in knitted, crocheted and embroidered goods of all kinds and in general to carry on a knitted wear business of making and

selling knitted, crocheted, or embroidered clothing either at wholesale or retail.

2. To purchase, lease or otherwise acquire and to hold, use, manufacture, or otherwise dispose of any materials and products which may be involved in the carrying on of the aforementioned business.

3. To do any and all lawful acts and things necessary, pertaining, convenient, or incidental to the foregoing purposes or any part thereof tending to increase the value, usefulness, comfort, or convenience of the property or any part thereof at any time held by said corporation, and to have or exercise all the rights, powers, and privileges appertaining to corporations of a similar nature organized and existing under the laws of the State of Maine; but not, however, to have or exercise any right, power, or privilege for any purpose for which corporations are not permitted to be formed under the General Laws of the State of Maine as provided in Section 1 to 24 both inclusive, of Chapter 56 of the Revised Statutes of Maine, 1954, and acts amendatory thereof or additional thereto. (Whitaker House Cooperative, Inc. charter.)

At this meeting by-laws were read to the assembled group and passed upon after appropriate amendments or changes were made by the women and then finally adopted by those present. The women then elected a Board of Directors from among their own group and also officers. Thereafter the organization of the cooperative corporation was completed as of July 18, 1957. The directors then met and hired as general manager one Evelyn M. Whitaker, a person known to the membership and directors at that time as being one who had a great deal of experience in the merchandising of the particular type of articles which these women made and whom they felt to have all the

qualifications necessary to fulfill the position as general manager. The Board of Directors also in behalf of the cooperative agreed to purchase an inventory of articles which the same Mrs. Whitaker had in her possession.

Thereafter the Board of Directors held monthly meetings. This required a certain amount of personal expense to each of them inasmuch as they had to travel distances of thirty to seventy miles, as far away as Lincoln, Maine, to attend these meetings for which they received no compensation. At these meetings the business operations of the cooperative were reported to the Directors, financial reports were submitted and general problems of business policy resolved by the Board of Directors. Many members other than Directors frequently attended the meetings of the Directors.

Soon after the cooperative started business it became swamped with applications for membership and orders from stores all over the country. It became apparent that Mrs. Whitaker could not perform the functions satisfactorily of both general manager and treasurer. She resigned as treasurer and the Board of Directors filled this vacancy by electing the Chairman of the Board of Directors, Mrs. Ella Mae Banton, as treasurer. In the case of both persons who held this position, they were required by the Directors to be bonded in the amount of \$2,000.

About two hundred women finally joined the cooperative. One hundred sixty of which were from Maine and approximately forty were from outside the State of Maine. A person desiring to become a member of the cooperative would make inquiries of any of the officers or the Board of Directors, whereupon they would be sent a copy of the by-laws and an application blank. They were required to submit a sample of their knitting to the home office and to pay a membership fee of \$3.00. Upon receipt of the sample from a prospective member and the application blank

properly executed by the applicant, Mrs. Whitaker as general manager would either approve or disapprove the application. If the application was disapproved, the applicant had the right to appeal to the Board of Directors. All of the members have paid their respective membership fee and no knitted or crocheted products are sold for any one other than members. In other words the cooperative acts as a selling agent only for its members.

In October of 1957 a special meeting of the members, was held at the Grange Hall in Troy, Maine where the Directors, officers and about forty members were in attendance. At this meeting reports of the business operation of the cooperative were given and the financial statement read to the members.

During the succeeding months financial problems arose which required the cooperative to obtain a bank loan in the amount of \$5,000 in the spring of 1958 which was used as operating capital. The cooperative gave its note to the lending bank. This note was personally endorsed by three of the directors and the vice-president, Mr. Jack Kennedy, who receives no salary or other compensation. In June of 1958 the annual membership meeting was held at Bangor, Maine, where again a report was given to the members by the cooperative's accountant, Francis Jacobs. At this meeting the members voted to amend certain of the by-laws and also voted to require an annual membership fee of \$3.00 and that payments to the membership be made every other month. A motion made at the June meeting to establish a cash reserve for the purpose of paying off back indebtedness was tabled.

It is interesting to note that at the first meeting of the associates in Waterville, Maine, the members voted to do certain things which were contrary to the advice of counsel then present. They adopted the name Whitaker House Cooperative, Inc. for example. They also voted to change

the proposed purposes which proposal would have limited them to making babies or infant's wear to the unlimited proposal finally adopted. They also voted to establish a fifty-one per cent quorum requirement which has subsequently created no little difficulty.

The evidence reveals that the operating method of the cooperative can be briefly summarized as follows: A member makes any number of articles she desires and sends or takes them to the main office of the cooperative in Troy, Maine, whereupon a slip is made out in duplicate under the members name listing the articles submitted, the number and the amount of the advance allowance which the cooperative will pay to her whenever the items are sold by the cooperative. The articles then submitted are trimmed, tagged, boxed and shipped by employees of the cooperative who are paid a dollar an hour. Experience since the cooperative started shows that the inventory turnover takes about three months and that the members do not receive their advance allowance for several months after they are sent in to the cooperative.

The amounts which are paid to each member for goods submitted are determined by the Board of Directors after deducting the anticipated cost of overhead and sales. The directors attempt to divide the price charged to the retail stores so that twenty per cent will go to the sales force, twenty per cent for all other expenses and sixty per cent will go to the members. In actual practice the amount received by the members has equaled approximately fifty-seven per cent.

The cooperative has a sales agent who, as described above, receives a twenty per cent sales commission. The orders obtained by the sales force from the cooperative's retail customers come directly to the cooperative where the general manager prepares the order for shipment, ships them directly to the retail store and bills are sent by her

directly to the retail store which again in return pays directly to the home office of the cooperative.

Members often call the home office of the cooperative in order to find out what items have been ordered in order that they may make things which they can expect to sell promptly through the cooperative. The designs or styles of the various items are made up by various members of the cooperative.

In the operation of the cooperative, which was organized as a non-profit organization, no one receives any profits from the sale of merchandise by the cooperative. There is no return on capital investment and the only entrepreneurial profit that could be available would be the amounts which the members would receive in the event that excess receipts were distributed after the payment of sales and overhead expenses.¹

On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative, and held that it did not "suffer or permit" its producing-members to work within the meaning of the Act. The basis of the holding is *completely* clear as the Circuit Court said in its opinion. . (275 F.2d at 363) "The parts of the record cited to us do not establish that the district court was clearly

¹ Events which have occurred since the day of the trial demonstrate even more fully the control of the cooperative by the members. They have cut costs by eliminating the salary of the president, discharging the accountant, cutting commissions to the sales force and by changing the method of packaging. They increased their income by raising the prices charged to the stores. On May 6, 1960 the home office of the cooperative was burned which resulted in a \$6,000 loss over and above the insurance carried on the inventory. This \$6,000 loss was not borne by Mrs. Whitaker, the president or the corporate entity known as the cooperative but by each individual member in proportion to her share of ownership in the entire inventory. All of this was done as a result of their own voting. These facts are recited to rebut the petitioner's claims on pages 12-13 of their brief, concerning the financial distress of the cooperative. The respondents contend this is irrelevant to the main issue.

erroneous in its finding that the cooperative was a bona fide cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a bona fide cooperative with control by the member-producers."

3. Statement of the Law

"Americans have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts." *Liggett Co. v. Lee*, 288 U.S. 517, Page 579, Brandeis, J.

"The aim of cooperatives is economic democracy on lines of liberty, equality and fraternity." *Frost v. Corporation Commission*, 278 U.S. 515, Page 536, Brandeis, J.

"Cooperation is a basic tenet of a civilized society. The combination of individual activity which is envisioned in cooperation can assume many forms and can have many purposes. The broad scope of the word "cooperation" is equally applicable to the word "cooperative" used as an adjective. The word "cooperative" used as a noun, how-

ever, has come to have the more limited meaning of a certain type of association.

"A cooperative is an association which furnishes an economic service without entrepreneur profit and which is owned and controlled on a substantially equal basis by those for whom the association is rendering service. The definition is of value as a matter of clarification but should not be used for substantive exclusion or for the limitation of analysis. Brandeis, J., long ago, pointed out that "no one plan of organization is to be labelled as truly cooperative to the exclusion of others."

"Preliminary comment should be made about the expression "entrepreneur profit" which really represents the antithesis of the benefits normally ascribable to cooperatives. "Entrepreneur profit" is used in the true economic sense of a return for the speculative or risk element in an enterprise. In a cooperative, all the members assume, in a broad sense, the economic risk, and they contemplate no return for the undertaking of the risk. In cooperatives there may be a return for the use of capital investment and even for the risk of loss, but there is no contemplation of an additional return on capital based upon the potentialities or the actualities of successful operation." *Law of Cooperatives*, 3rd Ed., Israel Packel, pages 1-3.

"Normally, a cooperative has the following attributes:

1. control and ownership of each member is substantially equal;
2. members are limited to those who will avail themselves of the services furnished by the association;
3. transfer of ownership interests is prohibited or limited;
4. capital investment receives either no return or a limited return;

3. economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association;
6. members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them;
7. death, bankruptcy, or withdrawal of one or more members, does not terminate the association; and
8. services of the association are furnished primarily for the use of the members." *Law of Cooperatives*, supra, pages 3-4.

"The primary objective of an ordinary cooperative is not charitable. In the normal case, the cooperative is designed to further the economic interests or welfare of its members. Economic welfare does not merely refer to financial savings or increased monetary returns. It cuts much deeper and takes into consideration basic aspects of economic life. Quality of product, decency of service, ownership, control and satisfaction of self-help are important benefits of cooperatives and sometimes are even more important than the direct financial benefits." *Law of Cooperatives*, supra, pages 6-7.

"The factor of individual ownership, which is an important aspect of cooperatives, is a distinguishable feature between communistic societies and cooperatives.

"This factor of individual ownership is the obvious reason why cooperatives and state communism are as far apart as any system of private capital and communism. The communistic concept of public ownership, bereft of religion and begat by revolution, makes the state supreme and the individual merely a tool of the state. In striking contrast is the democracy of control and ownership of a cooperative. That factor, combined with the concept of the member as an individual with basic rights, might well be

the vehicle for extended economic benefit in marginal areas of the world by way of self-help, rather than by way of public fiat." *Law of Cooperatives*, supra, page 8.

"The most stirring story of the cooperative movement is that of the Equitable Pioneers' Society organized in 1844 by a small group of laborers in Rochdale, Lancashire, England. That group is usually spoken of as the first consumer cooperative. The real emergence in this country of a settled policy, however, with regard to the cooperative movement came in 1875 when the so-called Rochdale principles were adopted at the convention of the National Grange of the Patrons of Husbandry. Notwithstanding the lapse of over one hundred years, the principles adopted by the small Rochdale group are still referred to in stating fundamental principles of cooperatives. Any discussion of cooperatives would be incomplete if it failed to refer to the following rules or practices adopted by those early economic pioneers in furnishing themselves with necessities of life: (1) charging of local prevailing prices; (2) limited interest on capital investment; (3) refunds in proportion to purchasers; (4) sale for cash and not for credit; (5) sex equality; (6) one vote for each member; and (7) regular and frequent meetings."

"The historic significance of the Rochdale cooperative has had its greatest impact in its emphasis upon the democratic nature of the enterprise. That aspect has been the intangible rallying call which has enabled many cooperatives to weather storms which could not have been safely met if there were reliance merely on the anticipated savings of the cooperative." *Law of Cooperatives*, supra, pages 12-13.

"The marketing cooperative must be considered in a broader aspect than marketing by only farmers. It refers to any cooperative which is utilized in order to help cooperative marketing by persons who produce economic

goods." *Law of Cooperatives*, supra, page 18, Italics supplied.

"Most cooperatives, other than the labor unions, have preferred to become incorporated. The lines of authority and the internal rights of the members, as well as the relations of the cooperative to third persons becomes much clearer and more certain with incorporation. Incorporation tends to produce more orderly administration of the affairs of the cooperative." *Law of Cooperatives*, supra, pages 34-35.

"Cooperation is a method of doing business. A cooperative association is a business organization, usually incorporated, owned and controlled by member producer, which operates for the mutual benefit of its members or stockholders, as producers or patrons, on a cost basis after allowing for the expenses of operation and maintenance and any other authorized deductions for expansion and necessary reserves. This definition is intended only as an approximation. It should be kept in mind that a cooperative association is a capitalistic institution. In fact a cooperative marketing or purchasing association is a capitalistic business organization for the financial advantage of its member-patrons. Few, if any, associations would be formed if it were not believed that they would operate to the financial advantage of their members. Associations are formed for the same reasons as other business enterprises. In a cooperative, however, the financial benefits accrue to the patrons, while in a commercial enterprise they accrue to those who have invested their money in the business." *Legal Phases of Cooperative Associations*, L. S. Hulbert, Farm Credit Administration, page 1.

"The cooperative character of an association does not depend on whether it is formed with or without capital stock. Either type of association may be thoroughly co-

operative if properly organized and operated." Ibid, page 2.

"It should not be assumed that the members or stockholders of a cooperative association, except in a technical legal sense, are separate and apart from the association. The members are the association, and the officers and directors of the association are simply their agents for the conduct of the joint enterprise. The officers and directors of an association are placed in office and continue there only through the action or acquiescence of the stockholders or members. In other words, the stockholders or members are the principal or the "employer" and the officers and directors are simply their "employees" or agents to direct the business; and agents are subject to the control of their employers.

"Frequently, if not generally, cooperative associations on receiving the products of a member make an advance to him which constitutes a "part payment" or more accurately partial returns; final returns are made after the sale of the products or at the end of the pooling or marketing period.

"Pooling is a practice common to cooperative associations. It is an averaging proposition. For instance, the expenses incident to the operation of an association are pooled and are then divided among the members on an equitable basis. Many cooperative marketing associations pool the products received from their members; that is, they mingle those products which are of the same grade and quality so that the identity of any particular lot is lost. On the sale of the products in a particular pool, the association renders a final account to each member, based upon the quantity he contributed to the pool. Some associations pool returns without pooling products; that is, the returns from the products of the same grade and quality which are sold during a given period, usually at varying prices, are

combined and are then divided among the members on a unit basis." Ibid, pages 5-6.

"Cooperative associations frequently make advances or partial "payments" to their members on receipt of their products. The question arises, in the event the advances or payments made exceed the amount to which the member is entitled, after deducting marketing expenses and all other authorized deductions from the sales returns, may the association recover the amount of such excess advances or payments from the member? The answer is "Yes." The basis for the recovery is the doctrine that no man shall be allowed to enrich himself unjustly at the expense of another or shall be allowed to retain money that in "equity and good conscience" belongs to another." Ibid, page 145.

"It has been held that where an association operated on a cash basis if the members had been overpaid for their products they became indebted to the association for the amount of the losses suffered by the association because of such overpayment, unless the loss was due to some negligence, fault, or misconduct of the association itself in the marketing of these products." *Legal Phases of Cooperative Associations*, by L. S. Hulbert, Farm Credit Administration, May 1942, page 147.

"Cooperation is an economic system with a social content. Its idealism penetrates both its economic and its social elements. The economic ideals affect the business enterprise, its methods and operations. The social ideals have a direct bearing on the association of persons comprising the society, particularly as they affect the membership and personnel relations." *The Cooperative Movement and Some of Its Problems*, Paul Hubert Casselman, 1951, page 1.

"The Rochdale Pioneers were inspired by the democratic spirit. Their democratic idealism incited them to

decentralize and to humanize control of business to the fullest extent possible, and still retain economic efficiency. In fact, it is difficult to find a more democratic method of business control which remains commercially sound. This democratic idealism explains the reasons for the following cooperative practices:

- (a) The limit of one vote per member irrespective of the number of shares held.
- (b) The elimination of voting by proxy.
- (c) The requirement of regular reports from the executives.
- (d) Constant education to keep the members informed.
- (e) The accessibility of the cooperative's books for inspection by the members.

Ibid, page 2.

"Cooperation brings to those small homecrafts the advantages of large-scale business by pooling both produce and purchases. In this way, the members of a cooperative can sell their products at retail prices."

"Cooperation permits these homecrafts to perform certain marketing functions which would be impossible to the individual operator. They are, for example, storage, transportation, financing, grading and packaging."

"Lastly but not least, the practice of cooperation has a moral effect on the people and makes them better citizens. They become more enlightened electors, more honest business men, and more social and charitable in general demeanor." Ibid, page 156.

4. Argument

The question whether an injunction can issue against the cooperative as an employer involves not questions on ad-

mitted facts, but the fundamental question of law, i.e. whether if persons choose to associate themselves cooperatively in the legitimate business of marketing the product of their handicraft, they can be restrained from doing so by the device of designating them their own employees.

It has been stated in the *Wagner* (*McComb v. Wagner*, 89 F. Supp. 304) and *Nutter* (*Mitchell v. Nutter*, 161 F. Supp. 799, (D.C. Me. 1958)) cases that six criteria, for determining whether or not an employment relationship exists, may be drawn from the leading Supreme Court decisions on employment relationships under this Act and the related Social Security and National Labor Relations Acts. These suggested criteria are: (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. When applied to the respondent cooperative it can be seen that the members in the conduct of their own individual businesses or craft receive a very valuable service from the cooperative and that as a matter of close analysis members do not render any service to the cooperative thus the first criteria listed above is inapplicable. It might be well to ask the question in respect to the first criteria: Who is the employer in this situation? Second, it will be observed that the members proportionately have a very high investment in materials, they being tenants in common of the fungible mass known as the cooperative inventory in addition to the materials they personally may have on hand. Compare this with the slight investment of the cooperative in shipping materials which of course is

actually the joint property of the members. Third, all of the authority for control of the entire operation is in the hands of the members who, through their by-laws, have delegated certain administrative functions to the Board of Directors and the officers. However, we should not lose sight of the fact that the members have the authority and have exercised it when the occasion arose, such as at the three meetings of the members. Fourth, the cooperative as a separate corporate entity has no opportunity for profit or loss nor do the officers. After payment of overhead and selling costs all-proceeds go directly to the members. If the cooperative is unable to sell the articles submitted for sale then the member, not the cooperative or the officers, stand to lose whatever materials and time that she has invested in these items. Fifth, the duration of the relationship which each member has with the cooperative depends upon the individual desires of the particular member.

The service rendered to the members by their group unit, or the Cooperative, is that of an agent for the marketing of their hand made goods. It is to be noted that the members do not transfer title to the Cooperative when they send in their items to be sold and the Cooperative is not liable to the members for any set purchase price. The Cooperative acting as an agent of the members sells the goods, pays the overhead and remits the balance to the members on a pro-rata basis.

Let us look at a couple of hypothetical situations. There are a number of individual boat builders in Maine, highly skilled in their craft who make a wide variety of boats in about every price range. Let us assume that some of them realize that as individuals they are unable to compete with large mail order and wholesale concerns in the better market areas because as individuals they cannot afford to hire sales representatives nor can they as individuals meet the volume requirements of modern metropolitan mer-

chandising methods. These craftsmen then decide to establish a cooperative of boat builders which will provide them with a centralized office and display room and will provide a sales force for them. The individual boat builders send their boats into the display room to be sold. The cooperative itself does not buy the boat. Query? Are these boat builders employees of their own cooperative? Even the petitioner should agree there is no employment relationship here. The petitioner would argue, of course, that the large investment of each builder in his tools and equipment together with other differences would enable them to avoid application of the Act.

Let us, then, take another example. Forget for the moment that those engaged in farming are exempt from the Act. Let us assume that a group of one hundred small potato share-cropping farmers become concerned about losing the middleman's profit on the sale of their potatoes. They organize a potato marketing cooperative. Let us also assume that they do not own the land on which their crops grow and they rent the equipment used to grow their crops. They elect four from among themselves to supervise the grading, packaging, storage and sale of potatoes and these four hire a professional potato wholesale manager. Can it be said that these farmers in growing their own potatoes are employees of their own marketing cooperative?

The immediate reaction is, of course, they are not employees. This hypothetical situation is a far cry from the organization established in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949) where the farmers hired others to do the work for which their cooperative had been established. The warehouse workers and manager of our hypothetical case would be the type to be covered under the Farmers Reservoir decision.

5. Legislative History Not Significant

The respondents agree that the legislative history reveals many unsuccessful attempts to exempt homeworkers from the provisions of the Act. Respondents have not, do not and will not advocate exempting homeworkers from the provisions of the Act. However, the Act only applies to homeworkers who are in fact employees. The members of Whitaker House Cooperative say that they are not employees and do not need or want the protection of the Act. As the District Court said (R. 215) . . . "it is difficult to see how the homeworkers here involved require the protection of the Act, or that the Act should be applied to them. The evidence discloses a marketing cooperative organized and operated by these ladies for the purpose of permitting them to sell to better advantage the products of their handicraft. In essence, the Cooperative exists to render services to its members; it receives the products produced by its members, sells the products for its members and distributes the net proceeds to its members as the articles submitted by them are sold. The record shows that the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear, and that they are so engaged for their own mutual benefit, and not as employees and employed by anyone. Their interests, as members and producers are identical. The work they perform is performed by them as members of the Cooperative, and not as its employees. Cf. *Halling v. Plymouth Mfg. Corp.*, 139 F.2d 178 (7th Cir. 1943, cert. denied, 322 U.S. 741 (1944))."

The petitioners repeatedly make reference to the congressional record involving the original consideration of the Act and proposed amendments thereto. An examination of these references discloses merely discussions of exemptions of admitted employees of agricultural coopera-

tives. No mention is made in these records as to whether or not member-owner-producers are at the same time employees of their own cooperative. The respondents agree that the congressional intent as expressed in the Fair Labor Standards Act was to include all employees unless specifically excluded. However, there is nothing in the congressional record which would indicate that member owners of a cooperative are employees.

"The "economic reality" of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative "suffer or permit" them to work. It has no connection with their labors. Rather, they, collectively, "suffer or permit" themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers. The Congress may wish in its legislative wisdom to declare that they so employ themselves. But in the opinion of this Court, the Act as written does not now so provide. This Court will not judicially legislate, whether it be urged to do so by homeworkers as in *Mitchell v. Nutter*, *supra*, or as here by the Department of Labor." *Mitchell v. Whitaker House Cooperative, Inc.*, 170 F. Supp. 743.

6. The Supreme Court Has Previously Rendered a Decision Involving The Present Issue in Favor of the Respondents.

This court denied the petition for writ of certiorari of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor against Plymouth Manufacturing Corporation *Walling v. Plymouth Manufacturing Corporation*, 139 F.2d 178 (7th Cir. 1943)

cert, denied 322 U.S. 741 (1944)), and therefore has already considered the situation where, if work done by a partner of a partnership is rendered as a partner for the partnership and not as an employee of the partnership then the Act does not apply. A cooperative is often defined as an incorporated variation of a partnership. Even though the court in the *Walling v. Plymouth* case did not rule upon the exact issue as to whether partners are employees of a partnership, it is significant that no later cases are reported involving this same partnership or any other partnership on this issue. It is perhaps even more significant that there does not seem to have been any great flood of partnerships in a wave of attempts by businesses to avoid the application of the Act in the wake of this case.

There is no likelihood that the country will be flooded with bona fide cooperatives to avoid the provisions of the Fair Labor Standards Act. Why, because it involves too much work with no entrepreneur profit. A businessman who might attempt it would soon find that he could not make a profit himself if he organizes a bona fide cooperative. If it is a "front" type cooperative then the Act would apply as it has for the last twenty-two years. The fact that the Act has been in effect this long without any true cooperatives being organized to avoid its application speaks louder than any argument the petitioner can put forth that the cooperative affords an easy means of vitiating the effect of the Act.²

7. Decisions Below Have Not Altered Established Law

The decision of the court below has in no way altered or changed the authority of prior rulings of this court or any other court as far as the meaning or the scope of the

² See 74 Harvard Law Review, No. 4, Recent Cases, P. 791 at 793.

Fair Labor Standards Act in its coverage of homeworkers is concerned. Indeed, the District Court below had shortly before the hearing in the instant case rendered a decision which followed all of the previous rulings involving homeworkers. (*Mitchell v. Nutter*, 161 F. Supp. 709, D. Maine.) This decision reviewed completely the long line of decisions involving the Act's coverage of homeworkers. It would be inconceivable that the court below should render a decision shortly afterwards which would change any of the effect of the prior ruling.

The court below examined the congressional history³ of the Act and found it "unenlightening." Specific Congressional reference to cooperatives, in context, are directed solely to the applicability of the Act to persons who are "employees" of a cooperative in the sense concluded by *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (170 F. Supp. 743);" (R. 212)

It is significant that the Court of Appeals involved here is the same court which rendered the opinion upon which the petitioner has so heavily relied throughout these entire proceedings, namely, *Fleming v. Palmer*, 123 F.2d, 749 (1st Cir. 1941), cert. denied, sub nom., *Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942).

The Court of Appeals below distinguished its previous decision in *Palmer* on the grounds that the former decision did not involve "... a bona-fide cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers." *Mitchell v. Whitaker House Coop. Inc.*, 275 F.2d at 363.

The Court of Appeals also distinguished *McComb v. Homeworkers' Handicraft Cooperative*, 176 F.2d 633. (4

³ The District Court had the attorneys for the petitioner obtain copies of all Congressional Committee hearings for the Court to examine before rendering its opinion.

(Cir.), cert. denied 338 U.S. 900 (1949), and stated that "the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account." *Mitchell v. Whitaker Coop. Inc.*, supra. *McComb v. Homeworkers' Handicraft Corp.* was another case upon which the petitioner heavily relied in the courts below. The petitioner gains nothing by alleging that the court below did not consider these decisions, for it is quite apparent from the reading of both opinions below that the courts were very concerned about the importance of this litigation and were extremely careful in their appraisal of the situation presented to them by this case.

8. **Whitaker House Cooperative, Inc. Is A True Cooperative**

Major differences between Members' Business and Evelyn Whitaker.

The Petitioner attempted without success, at the trial to show that the business of the Cooperative and Evelyn Whitaker were identical and that the latter had the same interests in both operations. That there are some similarities, must be admitted. The same type of merchandise is handled by the Cooperative and the items are still sent to Mrs. Whitaker's home for trimming, tagging, boxing, and shipping. The similarities end right there. They are hardly worth mentioning when compared to long lists of changes that have occurred. The following is a table which demonstrates the differences.⁴

⁴ See testimony of Evelyn Whitaker, (R. 68-124), Audrey Leavitt, (R. 124-127) and Ella Mae Banton, (R. 135-142).

MRS. EVELYN WHITAKER

1. Inventory owned by her.
2. Profits retained by her.
3. Sales personally performed by her.
4. Purchase and sales contract between homeworkers and herself.
5. Risk of loss entirely hers.
6. Prices to homeworkers set by her, lower than Cooperative.
7. Retail prices set by her, lower than Cooperative's.
8. Payments to homeworkers made promptly after she received goods.
9. Success of business rested on her initiative and judgment.
10. Accounting and bookkeeping performed by herself.
11. Records not available to homeworkers.
12. No reports given to homeworkers.
13. Self-employed.
14. Activities self directed.
15. Borrowed money in own name.
16. Income dependent on profits.
17. Personal checking account.

WHITAKER HOUSE
COOPERATIVE, INC.

1. Inventory, a fungible mass owned by all the members.
2. Non-profit, all proceeds after costs go to members.
3. Sales, handled by sales force hired by directors.
4. No purchase and sale agreement between cooperative and the members. The cooperative acts as a selling agent for the members.
5. Risk of loss entirely with the members.
6. Advance allowances set by Directors, members receive more than they did from Mrs. Whitaker.
7. Retail prices set by Directors.
8. Time and amount of payments determined by directors after goods are sold.
9. Success of business rests upon the Cooperation of all members.
10. Accounting and bookkeeping performed by independent accountant.
11. Records available to all members.
12. Reports given to all members and directors.
13. Mrs. Whitaker serves as general manager subject to the power of the Board of Directors to fire her.
14. Directors give General Manager orders and instructions.
15. Money borrowed in name of Cooperative.
16. General Manager's salary set by Directors.
17. Checking account in name of Cooperative, checks issued by treasurer who is a member.

16. Area of business limited to New England.
17. Trimmer's were her own personal employee's.
18. The members now have a nation-wide business.
19. Trimmer's employees of Cooperative, paid by Cooperative.
20. No other expenses.
21. Cooperative has expense of President's and Treasurer's salaries, printing, accounting, and sales force.

9. The Palmer Case Distinguished

The First Circuit Court in *Fleming v. Palmer et al*, 123 F.2d 749 found many facts to indicate that the pseudo-cooperative which had been set up in that case was certainly not an example of an industrial democracy.

Listed below are several points of difference which clearly show that Whitaker House Cooperative is a "true cooperative" owned and controlled by its members.

*PALMER CASE

1. Eight incorporators, one for each process of the business representing management. Homeworkers had no representative.
2. Palmer guaranteed payment of various accounts for the Cooperative.
3. Incorporators made no changes in by-laws.
4. "Bases of Contract" with Palmer bound the pseudo cooperative to Palmer so tightly that cooperative had no control of financial affairs.
5. By-laws are so phrased as to enable the Palmer interests to retain the same control that they had always enjoyed.
6. Palmer received ten per cent of the gross income.

WHITAKER HOUSE COOPERATIVE, INC.

1. Thirty-four of the thirty-six incorporators were highly skilled homeworkers who became members.
2. Whitaker House Cooperative has done business strictly on its own account.
3. Incorporators made several changes in by-laws.
4. Financial affairs of the cooperative are in the control of the member-directors.
5. By-laws place control of Cooperative in the hands of the members and or their duly elected representatives.
6. Evelyn Whitaker is paid a flat salary.

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| <p>7. No homeworkers admitted until a year after cooperative formed.</p> <p>8. Very few membership shares fully paid.</p> <p>9. Only small per cent of membership entitled to vote.</p> <p>10. Palmer stated cooperative would be dissolved when it became no longer necessary and that cooperative had to deal exclusively with him.</p> <p>11. Palmer and his lawyer suggested the formation of the "Cooperative."</p> <p>12. No meeting's of members to decide anything.</p> <p>13. Actions of executive Board subject to approval of Palmer.</p> <p>14. No evidence that members ever attempted to assert any control.</p> | <p>7. Membership consisted of homeworkers from the beginning.</p> <p>8. All membership's dues fully paid.</p> <p>9. Every member entitled to vote.</p> <p>10. No exclusive arrangement with Mrs. Whitaker.</p> <p>11. Cooperative idea suggested by a representative of the Department of Labor.</p> <p>12. Monthly meetings of member-directors attended by several members plus one special meeting of members and one annual meeting.</p> <p>13. Actions of General Manager subject to control of Directors.</p> <p>14. Record discloses an over-all pattern of active participation by members in establishing operating procedures in the collective effort to market their handwork.⁵</p> |
|--|--|

10. Original View of U. S. Department of Labor

The U. S. Department of Labor Wage and Hour Division issued a press release to the morning papers Wednesday, January 11, 1939, R. 158 which set forth an interpretation of the Fair Labor Standards Act in relation to its applicability to cooperatives. In this release it was conceded that "—it is possible that there may be workers' cooperatives in which the interests of the members as workers are

⁵ Change in purposes in charter, changes in By-laws, designating time to pay themselves every two months as at June 1958 meeting, attendance at meetings, request made to officers, all are examples of their active participation.

in all respects the same as their interests as proprietors and in which the usual characteristic of employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act—." (Respondent's appendix page 33)

11. Conclusion

The way of industrial democracy, i.e. through cooperative organization, must not be closed by the indirect device of designating member-owners of a true cooperative employees of themselves under the Fair Labor Standards Act.

The decision and judgment below should be affirmed.

Respectfully submitted,

PHILIP S. BIRD

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Appendix

For release morning papers
Wednesday, January 11, 1939

R-158

12. U. S. Department of Labor
Wage and Hour Division
Washington

**POSITION OF COOPERATIVE UNDER
THE WAGE AND HOUR ACT**

The Fair Labor Standards Act provides no express exemption for cooperatives as such, Administrator Elmer F. Andrews of the Wage and Hour Division, U. S. Department of Labor, pointed out today. Many requests have been received by the Wage and Hour Administrator for information regarding the status of employees of cooperatives, many of whom own stock in the enterprise by which they are employed. Mr. Andrews in his statement discussed the relationship existing between these employees and the organization which employs them, of which they may be part owners.

The Administrator's statement follows:

"The question has been asked whether cooperatives are employers and members who work for them employees within the terms of the Fair Labor Standards Act. The term cooperative is used to describe various types of business organizations differing in form and method of operation. Accordingly, no statement can be made to cover all types of organizations calling themselves cooperatives. However, it may be said generally that no justification can be found for concluding that member-workers of cooperatives, otherwise covered, are not entitled to the benefits of the Act.

Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers, are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members. Cooperatives are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends.

The Fair Labor Standards Act provides no express exemption in favor of cooperatives as do some other statutes and the provisions in the Act defining the employer-employee relationship cover the relation of the ordinary cooperative to its workers regardless of whether or not they are stockholders or members.

MAR 30 1961

JAMES R. BROWNING, Clerk

No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1960

**ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER**

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Because respondents' brief (which contains very few record references) makes several inaccurate or incomplete factual statements, this reply brief is filed to correct those assertions on which respondents appear to rely most heavily.

The unsoundness of respondents' factual claims is particularly evident from the comparative table on pages 24-25 of their brief, which makes unqualified assertions contradicted or unsubstantiated by the record, or seen in a very different light when all relevant evidence is considered. For example:

1. In Item 2 (p. 24) respondents state that, while previously the profits were retained by Mrs. Whit-

aker, under the Cooperative "all proceeds after costs go to members." The record shows that the homew~~orker-members~~ have received nothing other than the fixed piece rates for their work (R. 12-13, 125-126), and that the Cooperative since its inception has operated at a loss with a large indebtedness to Mrs. Whitaker for the transfer of her inventory to the Cooperative, as well as for her "salary" as manager (R. 193-195). Also, the by-laws of the Cooperative explicitly provide (Article 4, § 1) that "[t]he excess receipts of the Cooperative shall not be used to pay dividends to members on their membership interests" (R. 152), and that only after payment of expenses, establishment of "depreciation reserves," and of "a capital reserve," any balance "may, in the discretion of the Board of Directors, be used for patronage refunds which will be distributed according to the percentage of work submitted to the Cooperative for sale" (Article 11, § 2, R. 160). Even if this dubious provision could be construed as entitling the members to any "profits," the evidence shows it to be wholly illusory. As the Cooperative's accountant testified, the overhead, operating costs and current indebtedness are such that there is no likelihood that the Cooperative can become solvent in the foreseeable future (R. 208), much less that there will be any "profits" for distribution to homeworker-members.

2. In Item 3 (p. 24) respondents state that, while the sales were personally performed by Mrs. Whitaker, the sales under the Cooperative are handled by a "sales force hired by directors." The record shows

that this "sales force" is Mrs. Law, whose similar Tennessee homeworker operations had been enjoined (see petitioner's main brief, pp. 5, 11), and to whom, for several years immediately prior to the organization of the Cooperative, Mrs. Whitaker had regularly supplied substantial quantities of the articles produced by her Maine homeworkers—i.e., Mrs. Law had, in substance, previously been serving as a sales agent for Mrs. Whitaker personally (R. 62-63).¹

3. In Item 5 (p. 24) respondents state flatly that the risk of loss was entirely on Mrs. Whitaker previously, while under the Cooperative the risk of loss is entirely with the members. However, the by-laws explicitly provide (Article 4, § 2) that "[n]o member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (R. 152). There is no evidence in the record that the homeworker-members assumed the risks of loss of the business. Apparently, respondents' statement rests solely on counsel's outside-of-the record assertion (see respondents' brief, p. 7, fn. 1) that subsequent to the trial "the home office of the cooperative" (i.e., Mrs. Whitaker's home) was burned, resulting in a \$6,000 loss over and above the

¹ The undisputed evidence also shows that Mrs. Law, at the time of the organization of the Cooperative, had on hand "several hundred dollars" worth of merchandise furnished her by Mrs. Whitaker just prior to the formation of the Cooperative, and that Mrs. Whitaker "personally" (not the Cooperative) subsequently received payment for this merchandise from Mrs. Law (R. 63, 75). It appears that Mrs. Law and Mrs. Whitaker joined forces in the operation of the Cooperative (see petitioner's main brief, pp. 12-13, 53-54).

insurance on the inventory, and that this loss was borne, not by Mrs. Whitaker or the Cooperative, but by the homeworker-members "in proportion to [each member's] share of ownership in the entire inventory." Even if this extrinsic information should prove to be true or were a matter of record, the imposition of this loss on the homeworker-members (which obviously means that this loss was deducted from the already substandard meager piece-rates due them) serves only to highlight, we submit, the fact that the Cooperative is operated to protect Mrs. Whitaker's interests.² In this connection, it may be noted, also, that there is nothing in the record to support respondents' statement (on page 17 of their brief) that "the members do not transfer title to the Cooperative when they send in their items to be sold." Respondents' brief itself later (p. 24) describes the inventory as a "fungible mass owned by all the members," and everything in the record points to the conclusion that title was transferred to the Cooperative. Thus, the Cooperative's financial statements list the "Merchandise inventory" under its "Assets" (R. 194), and the Cooperative offered the inventory as collateral security when seeking a bank loan to the Cooperative (R. 175).

² Respondents' statement that the imposition of this loss "was done as a result of their own [the individual members'] voting" raises questions as to how this voting was carried out. Was it, like all the other voting of members, at a meeting without a quorum present? (See petitioner's main brief, pp. 9, 56). Were respondents Bird and Whitaker present at the meeting where this "voting" took place and did either of them suggest the "problem" which prompted the "voting"? (Cf. petitioner's main brief, pp. 51-52).

4. In Item 8 (p. 24) respondents state that Mrs. Whitaker previously made payments to homeworkers "promptly after she received goods," while the "amount of payments [are] determined by directors after goods are sold" under the Cooperative (see also statement on p. 17 of respondents' brief that "the Cooperative is not liable to the members for any set purchase price"). However, respondents' own witness testified unqualifiedly that there were definite fixed prices under the Cooperative and that the homeworkers expected to get those prices (R. 129-130, see also schedule of rates, R. 12-13), and that there was not very much difference in the time when payments were made—that there were times when payments were slow before the Cooperative was organized "when they built up an inventory or customers were hard to get or * * * slow in paying," just as occurred under the Cooperative (R. 131). The record also shows that at the board of directors' meeting on August 22, 1957, a motion was passed that all goods submitted before the 10th of the month would be paid for on or before the 20th of that month, and that any received after the 10th would be paid for by the 20th of the following month (R. 170-171). At the stockholders' meeting almost a year later, on June 26, 1958, a recommendation by the Cooperative's accountant (Francis W. Jacob) to withhold 40% of the amount due members for a few months so as to build up a cash reserve was tabled and, instead, a motion that "payments be sent to members on a set date at fixed periods * * * every two months" was passed (R. 181-182).

5. In Item 15 (p. 24) respondents assert that, after the organization of the Cooperative, money was borrowed in the name of the Cooperative. The only loan to the Cooperative shown in the record was the \$5000.00 loan, the note for which, although made by the Cooperative, was also personally endorsed by Mrs. Whitaker's relative, Kennedy (R. 83, 85), who was not a qualified member of the Cooperative and whose interest in the Cooperative was patently on Mrs. Whitaker's behalf (see petitioner's main brief, pp. 50-51).^a

Respectfully submitted.

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MARCH 1961.

^a An insignificant error in respondents' brief appears in Item 1 of the comparative table on page 25. The correct figures are 26 of the 28 incorporators—not 34 of the 36 (R. 164, 201).

SUPREME COURT OF THE UNITED STATES

No. 274.—OCTOBER TERM, 1960.

Arthur J. Goldberg, Secretary
of Labor, Petitioner,

v.

Whitaker House Cooperative,
Inc., et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the First Circuit.

[April 24, 1961:]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is a cooperative organized in 1957 under the laws of Maine; and we assume it was legally organized. The question is whether it is an "employer" and its members are "employees" within the meaning of the Fair Labor Standards Act of 1938, § 3, 52 Stat. 1060, as amended, 29 U. S. C. § 203. The question is raised by a suit filed under § 17 of the Act by petitioner to enjoin respondent from violating the provisions of the Act concerning minimum wages (§ 6), record-keeping (§ 11 (c)) and the regulation of industrial homework (§ 11 (d)). And see § 15 (a)(5). The District Court denied relief. 170 F. Supp. 743. The Court of Appeals affirmed by a divided vote. 275 F. 2d 362. The case is here on a petition for certiorari which we granted (364 U. S. 861) because of the importance of the problem in the administration of the Act.

The corporate purpose of the respondent as stated in its articles is to manufacture, sell, and deal in "knitted, crocheted, and embroidered goods of all kinds." It has a general manager and a few employees who engage in finishing work, i. e., trimming and packaging. There are some 200 members who work in their homes. A homemaker who desires to become a member buys from

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respondent a sample of the work she is supposed to do, copies the sample, and submits it to respondent. If the work is found to be satisfactory, the applicant can become a member by paying \$3 and agreeing to the provisions of the articles and bylaws. Members were prohibited from furnishing others with articles of the kind dealt in by respondent.¹ They are required to remain members at least a year. They may, however, be expelled at any time by the board of directors if they violate any rules or regulations or if their work is substandard.² Members are not liable for respondent's debts; they may not be assessed; each has one vote; their certificates are not transferrable; each member can own only one membership; no dividends or interests are payable on the certificate "except in the manner and limited amount" provided in the bylaws. The bylaws provide that "excess receipts" are to be applied (1) to writing off "preliminary expenses"; (2) to "necessary depreciation reserves"; (3) to the establishment of a "capital reserve." The balance may be used in the discretion of the board of directors "for patronage refunds which shall be distributed according to the percentage of work submitted to the Cooperative for sale." Members are paid every month or every other month for work submitted for sale on a rate-per-dozen basis. This payment is considered to be "an advance allowance" until there is a distribution of "excess receipts" to the members "on the basis of the amount of goods which each member has submitted to [respondent] for sale."

¹ This provision of the bylaws was purportedly removed by a vote at the annual meeting of June 26, 1958, though a quorum was not present at the meeting. See *Mitchell v. Whitaker House Cooperative, Inc.*, 170 F. Supp., at 749, nn. 7, 8, 751.

² An expulsion may be appealed by filing a petition "to be acted upon by the members at the next meeting." Cf. Me. Rev. Stat., c. 56, § 16.

By § 11 (d) of the Act the Administrator is authorized to make "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Section 11 (d) was added in 1949³ and provides that "all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect."

These Regulations⁴ provide that no industrial homework, such as respondent's members do, shall be done "in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate"⁵ has been issued. Respondent's members have no such certificates; and the question for us is whether its operations are lawful without them and without compliance by respondent with the other provisions of the Act.

These Regulations have a long history. In 1939, shortly after the Act was passed, bills were introduced in the House to permit homeworkers to be employed at rates lower than the statutory minimum.⁶ These amendments were rejected.⁷ Thereupon the Administrator issued regulations governing homeworkers;⁸ and we sustained some of them in *Gemsco, Inc., v. Walling*, 324 U. S. 244, decided in 1945. In 1949 the House adopted an amendment which would have exempted from the Act a large group

³ Fair Labor Standards Amendments of 1949, § 9, 63 Stat. 910, 916.

⁴ See 29 CFR §§ 530.1-530.12.

⁵ *Id.*, § 530.2.

⁶ See H. R. Rep. No. 522, 76th Cong., 1st Sess., p. 10; 86th Cong. Rec. 4924, 5122.

⁷ 86 Cong. Rec. 5499; see also the remarks of Mr. Zimmermah, *id.*, at 5136, and of Mr. Hook, *id.*, at 5224-5225.

⁸ The Knitted Outerwear Wage Order, which covers the industry in which respondent is engaged, was issued April 4, 1942. See 7 Fed. Reg. 2592.

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of homeworkers.* The Senate bill contained no such exemption; and the Conference Report rejected the exemption.¹⁰ Instead, § 11 (d) was added, strengthening the authority of the Administrator to restrict or prohibit homework.¹¹ Still later respondent was organized; and, as we have said, it made no attempt to comply with these homework regulations.

We think we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations. By § 3 (d) of the Act an "employer" is any person acting "in the interest of an employer in relation to an employee." By § 3 (e) an "employee" is one "employed" by an employer. By § 3 (g) the term employ "includes to suffer or permit to work." We conclude that the members of this cooperative are employees within the meaning of the Act.

There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would "suffer or permit" them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them "the opportunity to work, and paying them for it," to use the words of Judge Aldrich, dissenting below. 275 F. 2d, at 366. However immediate or remote their right

* 95 Cong. Rec. 11209-11210.

¹⁰ H. R. Rep. No. 1453, 81st Cong., 1st Sess.

¹¹ 95 Cong. Rec. 14927.

to "excess receipts" may be,¹² they work in the same way as they would if they had an individual proprietor as their employer.¹³ The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.¹⁴ Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management in other words can hire or fire the homeworkers. Apart from the other considerations we have mentioned, these powers make the device of the cooperative too transparent to survive the statutory definition of "employ" and the Regulations governing homework. In short, if the "economic reality" rather than "technical concepts" is to be the test of employment (*United States v. Silk*, 331 U. S. 704, 713; *Rutherford Food Corp. v. McComb*, 331 U. S. 722, 729); these homeworkers are employees.

Reversed.

¹² There has been no distribution of "excess receipts" to the members. The evidence is that respondent could survive "as a financially solvent enterprise only by doubling its present gross income." As of the date of the trial, respondent was in arrears even as respects what it owed its managerial employees. See 170 F. Supp., at 751.

¹³ See *Mitchell v. Law*, 161 F. Supp. 795.

¹⁴ When the cooperative desired to reduce its inventory and the rate of production of its members, it withheld the "advance allowances."

SUPREME COURT OF THE UNITED STATES

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the First Circuit.

[April 24, 1961.]

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

It is clear and undisputed that the Fair Labor Standards Act does not apply in the absence of an employer-employee relationship. Here, upon what seems to me to be ample evidence, the District Court found that the cooperative was created and is being operated as a true cooperative under the laws of Maine, 170 F. Supp. 743, and, on appeal, the Court of Appeals approved those findings. 275 F. 2d 362. Unless those findings are clearly erroneous, they must be accepted here. Fed. Rules Civ. Proc., 52 (a), 28 U. S. C. Accepting them excludes any notion that the cooperative was formed or availed of as a "device" to circumvent the Act. It is not seriously contended here that these findings of the two courts below were "clearly erroneous," but rather the Government's principal contention is that the bona fides of the cooperative are immaterial.

Doubtless, even a true cooperative may have employees. But surely a true cooperative does not automatically become the "employer" of its "members" in the commonly understood sense of those terms, nor, hence, in their sense as used in subparagraphs (d) and (e) of § 3 of the Act, 29 U. S. C. § 206 (d) and (e). Something more is required. For the Act to apply, the cooperative must in a fair sense

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"employ" its "members." Like the two courts below, I think it may not fairly be said, on this record, that there is any evidence that the cooperative ever did "employ" its "members," or suffer or permit them to work for it. Instead, the evidence shows, as the two courts below found and as I read it, that each member worked for herself—in her own home when and as she chose—toward the production of knitted articles which she marketed through her cooperative, receiving immediately "an advance" thereon, and ultimately—after payment of her portion of the cooperative's "expenses" and setting up its "necessary depreciation [and capital] reserves"—the balance of the proceeds of sale would "be distributed [to her] according to the percentage of work [she] submitted to the cooperative for sale." Like the two courts below, I fail to see in this any element of employment by the cooperative of its members.

If, as seems practically inevitable in the light of the Court's judgment, the cooperative must now be dissolved, will not its assets, including its "depreciation [and capital] reserves" as well as its "excess receipts," have to be refunded to its members "according to the percentage of work submitted [by them respectively] to the cooperative for sale," and not according to their memberships or investments, just as required by the Maine statute and the cooperative's articles? This seems wholly inconsistent with any notion that the members were employees of the cooperative or that they were suffered to work for it, or that it bought or paid them for their knitted articles.

On the basis of the amply supported findings of the two courts below, it seems reasonably clear that the cooperative never did "employ" its "members," and inasmuch as the Act does not apply in the absence of an employment relationship, I think the judgment of the two courts below is consonant with the facts and the law and should be affirmed.